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# AFFIDAVITS

by  
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## TOPIC SCOPE

### Scope of Topic:

This article discusses the basic aspects of affidavits generally, including the nature of affidavits, who may make and take affidavits, the constituent parts, formal requisites and amendment of affidavits, and their use as and in evidence.

### Federal Aspects:

There are no federal laws discussed particularly in this article. As to use of affidavits in federal court proceedings, see 32 Am Jur 2d, Federal Practice and Procedure.

### Treated Elsewhere:

Depositions, **see** 23 Am Jur 2d, Depositions and Discovery  
Verification of pleading or written accusations in civil and criminal cases, **see** 41 Am Jur 2d, Indictments and Informations ;61A Am Jur 2d, Pleading  
Affidavit as basis for arrest or preliminary examination, **see** 5 Am Jur 2d, Arrest ; 21 Am Jur 2d, Criminal Law  
Civil or criminal liability in connection with the making of a false or defamatory affidavit, **see** 50 Am Jur 2d, Libel and Slander ; 52 Am Jur 2d, Malicious Prosecution ; 60 Am Jur 2d, Perjury  
Liability of notary public for taking false affidavit, **see** 58Am Jur 2d, Notaries Public  
Oaths and affirmations generally, **see** 58 Am Jur 2d, Oath and Affirmation  
Defects in affidavit as rendering judgment subject to collateral attack, **see** 46 Am Jur 2d, Judgments

## RESEARCH REFERENCES

### Annotation References:

ALR Quick Indexes: Affidavits  
Federal Quick Index: Affidavits  
L Ed Index to Annotations: Affidavits

### Practice References:

1 Am Jur Pl & Pr Forms (Rev), Affidavits  
1 Am Jur Legal Forms 2d, Affidavits and Declarations  
Federal Procedure, L Ed, Affidavit

### Insta-Cite(R):

Cases and annotations referred to herein can be further researched through the **Insta-Cite(R)** citation verification service. Use Insta-Cite to check citations for Bluebook styling, parallel references, prior and later history, and annotation references.

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## I. IN GENERAL [1, 2]

### **Research References**

ALR Quick Indexes, Affidavits

Federal Quick Index, Affidavits

L Ed Index to Annotations, Affidavits

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### **§ 1 Generally; definition**

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An affidavit is any voluntary ex parte statement reduced to writing and sworn to or affirmed before some person legally authorized to administer an oath or affirmation. 1 A mere affidavit, as distinguished from a deposition or the like, 2 is made without notice to the adverse party and without opportunity to cross-examine. 3 In fact, an affidavit has been defined by statute as "a written declaration under oath, made without notice to the adverse party." 4

In some jurisdictions, statutes authorize alternatives to the use of affidavits. For example, in California, matters that are supportable by affidavit are generally also supportable by a declaration under penalty of perjury, which is an unsworn statement subscribed to by the person making it and certified or declared to be true under penalty of perjury. 5 And in New York, attorneys and certain specified medical professional persons are authorized by statute to serve an affirmation bearing the person's signature alone in lieu of and with the same force and effect as an affidavit. 6 The reader should consult local statutes to determine if an alternative to use of an affidavit is available.

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### **§ 1 ----Generally; definition [SUPPLEMENT]**

#### **Case authorities:**

18 USCS § 1623 governed lawfulness of defendant's unsworn statements by incorporating 18 USCS § 1746 by reference, since matter was one permitted to be supported by sworn declaration. *United States v Gomez-Vigil* (1991, CA6 Mich) 929 F2d 254.

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### **Footnotes**

Footnote 1. *Otani v District Court of Twenty-First Judicial Dist.* (Colo) 662 P2d 1088; *Cox v Stern*, 170 Ill 442, 48 NE 906; *Dawson v Beasley*, 242 Ind 536, 180 NE2d 367; *Pappas v State*, 179 Ind App 547, 386 NE2d 718; *Re Murphy*, 321 Mass 206, 72 NE2d

413; *People Use of Esper v Burns*, 161 Mich 169, 125 NW 740; *Torkelson v Byrne*, 68 ND 13, 276 NW 134, 113 ALR 1213; *Shelton v Berry*, 19 Tex 154; *Fugate v Buffalo* (Wyo) 348 P2d 76, 97 ALR2d 243 (affidavit implies that person making affidavit has taken an oath).

Footnote 2. § 2.

Footnote 3. *Kirk v Hartlieb*, 193 Ark 37, 97 SW2d 434; *Robb v McDonald*, 29 Iowa 330; *Thatcher v Darr*, 27 Wyo 452, 199 P 938, 16 ALR 1442.

Where a motion is submitted on affidavits and resisted in like manner, a party is not entitled to cross-examine an affiant who is present in court upon the hearing of the motion, although he may call such affiant as his own witness. *State ex rel. Hansen v District Court of Ninth Jud. Dist.*, 72 Mont 245, 233 P 126.

Footnote 4. *State ex rel. State Bar Ass'n v Finn*, 32 Or 519, 52 P 756.

Footnote 5. *Re Morelli* (2d Dist) 11 Cal App 3d 819, 91 Cal Rptr 72.

Footnote 6. *Slavenburg Corp. v Opus Apparel, Inc.*, 53 NY2d 799, 439 NYS2d 910, 422 NE2d 570, ruling, however that even those persons who are statutorily allowed to use affirmations in lieu of affidavits cannot do so when they are a party to an action.

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## § 2 Distinctions

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Although the terms "affidavit" and "deposition" have sometimes been used interchangeably, 7 there is a well-defined distinction between them which is generally recognized. 8 Whereas an affidavit is a voluntary statement made ex parte, without notice to the adverse party or an opportunity to cross-examine, 9 a deposition, in its more technical and appropriate sense, is limited to the written testimony of a witness given in the course of a judicial proceeding, either at law or in equity, in advance of the trial or hearing upon oral examination or in response to written interrogatories and where an opportunity is given for cross-examination. 10 Moreover, the giving of a deposition may be compelled, 11 whereas it is generally held that the giving of an affidavit may not be compelled. 12

An affidavit differs from an acknowledgment of an instrument in that an affiant vouches, by oath or affirmation, that what is said in the affidavit is true, 13 while an acknowledgment is a manner of authenticating an instrument by showing that it was the free deed and act of the person executing it. 14 A requirement that a paper be "sworn to" contemplates the execution of an affidavit that the facts contained in it are true, and not an acknowledgment. 15

An affidavit differs from an oath in that an affidavit consists of a statement of fact, which is sworn to as the truth, while an oath is a pledge. 16

Broadly speaking, pleadings and affidavits are distinguishable in that affidavits must state facts under oath, whereas pleadings may contain allegations of ultimate facts, and verification of a pleading may not be necessary in all cases. 17

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## Footnotes

Footnote 7. *Robb v McDonald*, 29 Iowa 330.

Footnote 8. *James v Logan*, 82 Kan 285, 108 P 81; *State v Dayton*, 23 NJL 49; *State v Quartier*, 114 Or 657, 236 P 746.

Footnote 9. § 1.

Footnote 10. See 23 Am Jur 2d, Depositions and Discovery § 108.

Footnote 11. See 23 Am Jur 2d, Depositions and Discovery § 148.

Footnote 12. Owing to the loose manner in which the two terms are sometimes used interchangeably, and the fact that occasionally the circumstances under which a deposition is actually made may exactly resemble the manner of taking an affidavit, some decisions may appear to hold that a party may be compelled to make an affidavit by commitment for contempt. Nevertheless, a close scrutiny will show that the instrument in question is, in truth, a deposition, and not an affidavit. See *Robb v McDonald*, 29 Iowa 330.

But see *Guth v Minnesota Mining & Mfg. Co.* (CA7 Wis) 72 F2d 385, cert den 294 US 711, 79 L Ed 1245, 55 S Ct 506 (holding that the making of an affidavit may be compelled, under certain circumstances, by a court of equity in compelling the performance of an agreement, unless the facts set forth in the affidavit are statements which the affiant may legitimately object to making).

Footnote 13. § 11.

Footnote 14. See 1 Am Jur 2d, Acknowledgments § 1.

Footnote 15. *State v Wolfe*, 156 Conn 199, 239 A2d 509; *Gilman Paint & Varnish Co. v Legum*, 197 Md 665, 80 A2d 906, 29 ALR2d 286.

The term "sworn to" implies that the subscriber shall have declared under oath the truth of the statement to which his name is subscribed, and a certificate which merely recites that the claimant "acknowledges" execution of the instrument is insufficient. *Bell & Zajicek, Inc. v Heyward-Robinson Co.*, 23 Conn Supp 296, 182 A2d 339.

Footnote 16. See 58 Am Jur 2d, Oath and Affirmation § 3.

Footnote 17. *State v Londe*, 345 Mo 185, 132 SW2d 501.

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## II. WHO MAY MAKE AFFIDAVIT [3-7]

### **Research References**

ALR Quick Indexes, Affidavits

Federal Quick Index, Affidavits

L Ed Index to Annotations, Affidavits

1 Am Jur Pl & Pr Forms (Rev), Affidavits, Forms 91 et seq., 122

1 Am Jur Legal Forms 2d, Affidavits and Declarations §§ 13:122, 13:141 et seq.

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### **§ 3 Generally**

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In the absence of statutory regulation, generally, anyone who has knowledge of the facts and is competent to testify may make an affidavit. 18 If, on the other hand, a person would for any reason be disqualified as a witness, it has been held that he is disqualified to make an affidavit. 19

◆ **Caution:** As a general proposition, if a statute or a rule of practice prescribes who may make a certain affidavit, such affidavit can be made by none other than those specified, even though there is nothing in the language of the statute to show that its designation was intended to be exclusive. 20

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### **Footnotes**

Footnote 18. Moore v Besse, 35 Cal 184.

**Annotation:** 47 ALR2d 423 § 3 (affidavit for service by publication).

An affidavit of nonresidence made by a disinterested stranger having knowledge of the facts is sufficient where the statute only requires that the necessary facts appear by affidavit to the satisfaction of the court. Davis-Heller-Pearce Co. v Ramont, 66 Cal App 778, 226 P 972.

As to necessity that allegation of facts in affidavit be based on knowledge, see § 20.

As to the right to make an affidavit verifying a pleading on behalf of coparty, see 61A Am Jur 2d, Pleading § 344.

As to whether an affidavit for purposes of service by publication on behalf of several co-complainants must be made by all the co-complainants, see 62 Am Jur 2d, Process § 114.

**Practice Aids:** –Allegations as to capacity of affiant. 1 Am Jur Legal Forms 2d, Affidavits and Declarations §§ 13:141 et seq.; 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Forms 91 et seq.

Footnote 19. Webster v Mann, 56 Tex 119.

Footnote 20. First Nat. Bank v Reeves, 27 Ariz 508, 234 P 556; Hinkle v Lovelace, 204 Mo 208, 102 SW 1015 (superseded by statute on other grounds as stated in McCammon v McCammon (Mo App) 680 SW2d 196); State v Payne, 195 Or 624, 244 P2d 1025; Taylor v Sutherlin-Meade Tobacco Co., 107 Va 787, 60 SE 132.

**Annotation:** 47 ALR2d 423 § 5 (affidavit for service by publication).

As to whether agent or attorney may make affidavit where statute does not so provide, see § 4.

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#### § 4 Agent or attorney

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Under many circumstances, it is proper, and even necessary, that an affidavit be made by an agent or attorney. Usually, where the principal is absent or ill, or for some other reason is unable to make an affidavit, an affidavit by his agent or attorney, who has knowledge of the facts, will be received, 21 although the affidavit in such case should specifically state why it is not made by the party himself. 22 Generally, however, where a statute points out the parties who may make a certain affidavit, it is construed to exclude all others except those designated, 23 so that the principle that what a party may do in person he may do by agent has no application. 24 Consequently, such statutes that do not in terms expressly authorize an affidavit to be made by an agent or attorney have generally been held to exclude such an affidavit. 25 It is, however, within the judgment or discretion of the court to receive the affidavit of an agent or attorney in situations where a different construction of the statute might defeat the ends of justice. 26

A statute may expressly authorize affidavits for certain purposes to be made by agents or attorneys. 27 However, the statutes frequently require that an affidavit made by an agent or attorney state why it is not made by the party. 28

◆ **Reminder:** Since it is generally a requirement that an affiant have knowledge of the facts, 29 it is good practice for the agent to show he has special knowledge, indicating the sources thereof, except when the affidavit may be, and is, made on information and belief. 30 Also, the affidavit of an agent should contain some indication as to the agency or other capacity in which the affiant makes it, although, in general, a mere recital of the affiant's agency for the party is sufficient. 31

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#### § 4 ----Agent or attorney [SUPPLEMENT]

**Practice Aids:** Capacity of affiant–Attorney of record–Residence identified. 1B Am

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**Footnotes**

Footnote 21. *Shattuck v Myers*, 13 Ind 46; *Wilson v Steinbach*, 98 Wash 2d 434, 656 P2d 1030.

The affidavit of an attorney stands precisely on the same plane with all other affidavits. Accordingly, it must rest upon his personal knowledge in an area in which he is competent to testify. *Bowman v Henard* (Tenn) 547 SW2d 527.

An attorney's affidavit concerning matters about which he has no personal knowledge has little if any probative value. *Carr v Carruth* (3d Dept) 85 App Div 2d 800, 445 NYS2d 613.

The practice of an attorney filing an affidavit on behalf of his client asserting the status of that client is not approved. Not only does the affidavit become hearsay but it places the attorney in a position of a witness, thus compromising his role as an advocate. *Porter v Porter* (ND) 274 NW2d 235 (affidavit as to employment status of parties in dissolution of marriage case for purposes of showing that affiant's client was unable to pay costs and attorney's fees necessary for appeal).

**Practice Aids:** –Allegations of capacity of affiant as agent of principal. 1 Am Jur Legal Forms 2d, Affidavits and Declarations § 13:143; 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Form 93.

–Allegations as to capacity of affiant as attorney of record or employee thereof. 1 Am Jur Legal Forms 2d, Affidavits and Declarations §§ 13:141, 13:142; 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Forms 91, 92.

Footnote 22. In *The Schooner Adeline*, 13 US 244, 3 L Ed 719, the court held that where a principal is without the country or resides at a great distance from the court, the admission of a claim and test affidavit made by his agent is the common course in admiralty. But where the principal is within a reasonable distance, something more than a formal affidavit by his agent is expected—at least the supplementary oath of the principal as to the facts should be tendered, for otherwise its absence might produce unfavorable suspicions. As to affidavits made by agents or attorneys of corporations, see §§ 5-7.

Footnote 23. § 3.

Footnote 24. *Shattuck v Myers*, 13 Ind 46.

Footnote 25. *First Nat. Bank v Reeves*, 27 Ariz 508, 234 P 556 (declaration of homestead must be personally verified by the claimant); *Quigley v Mexico Southern Bank*, 80 Mo 289 (allegation under oath as basis of service by publication); *State v Payne*, 195 Or 624, 244 P2d 1025 (affidavit for postponement of trial).

Where a statute provides that a divorce bill must be accompanied by an affidavit of the complainant stating that it is not filed in collusion with the defendant for the purpose of obtaining a divorce, the affidavit must be made by the complainant, and a general statute

providing that in all cases where the oath of affirmation of a party is required such oath or affirmation may be made by his agent or attorney, is not applicable. *Vance v Vance*, 197 Miss 332, 20 So 2d 825.

Footnote 26. *Southern Attractions, Inc. v Grau* (Fla) 93 So 2d 120; *Shattuck v Myers*, 13 Ind 46 (allowing the court discretion to grant or refuse an application for change of venue upon the affidavit of the party's attorney under a statute permitting a change "upon application of either party, made upon affidavit showing," etc.); *Seigle v Richardson* (Okla) 317 P2d 767.

**Annotation:** 47 ALR2d 423 § 3 (affidavit for service by publication).

A statute providing for constructive service of process on nonresident motorists, and requiring "plaintiff's affidavit of compliance" with the provisions of the act, is to be construed as meaning that plaintiff may cause such affidavit to be made by the person mailing the summons who is not necessarily the plaintiff himself. *Schilling v Odlebak*, 177 Minn 90, 224 NW 694.

Under a statute providing for constructive service upon nonresident motorists which required that "plaintiff . . . shall cause . . . original notice of suit to be served . . . by filing a copy . . . with said commissioner," it has been held that an affidavit of service by the attorney for the plaintiff in an action against a nonresident complied with the statutory requirement. *Welsh v Ruopp*, 228 Iowa 70, 289 NW 760.

An affidavit for service by publication may be made by the plaintiff's attorney under a statute requiring an affidavit of the "plaintiff's" lack of knowledge and inability to ascertain whether the named defendant was living or dead. *Faulkner v Kirkes* (Okla) 276 P2d 264, 47 ALR2d 418.

Footnote 27. *United States v Bryant*, 111 US 499, 28 L Ed 496, 4 S Ct 601; *Greene v Greene*, 145 Miss 87, 110 So 218, 49 ALR 565 (verifications of pleadings); *Schwarz v Smith* (Tex Civ App Waco) 325 SW2d 407, writ ref n r e 160 Tex 280, 329 SW2d 83.

**Annotation:** 47 ALR2d 423 § 4 (affidavit for service by publication).

As to verification of pleading by attorney or agent, see 61A Am Jur 2d Pleading § 343.

Footnote 28. *Detroit Automatic Scale Co. v Torgeson*, 36 SD 564, 156 NW 86.

Footnote 29. § 20.

Footnote 30. *Wakely v Sun Ins. Office*, 246 Pa 268, 92 A 136, 3 ALR 128 (affidavit made by agent of corporation).

**Annotation:** 47 ALR2d 423 § 11[a-c] (affidavit for service by publication).

Rule permitting affidavit to be made by a party's attorney or agent does not obviate the necessity of showing that the attorney has personal knowledge of the facts, as distinguished from information obtained from the client. Thus, if an attorney must act as an affiant, the better practice is to state explicitly how the information stated in the affidavit was obtained. *Landscape Design & Constr., Inc. v Warren* (Tex Civ App



Dallas) 566 SW2d 66, later app (Tex Civ App Texarkana) 598 SW2d 38, 29 UCCRS 916, writ ref n r e.

But see *Hill v Floating Decks of America, Inc.* (Tex Civ App San Antonio) 590 SW2d 723, stating that no requirement that an attorney or agent making an affidavit state that he has personal knowledge of the facts should be imposed in the absence of a statute requiring a recital of personal knowledge, where the facts are of such a nature that they may be reasonably considered to be within the personal knowledge of the affiant, whether the affiant be the party to the suit or his attorney or agent.

Where the statute authorizes an affidavit made by the plaintiff, his agent, or attorney, the making of an affidavit by an agent or attorney necessarily implies that he may not be able to make it on positive knowledge, and allegations made by an agent "to the best of his knowledge, information and belief" are sufficient until controverted. *United States v Bryant*, 111 US 499, 28 L Ed 496, 4 S Ct 601.

As to affidavits on information and belief, see § 22.

Footnote 31. *Anthony v Anthony*, 221 Ala 221, 128 So 440; *Jotter v Charles B. Marvin Inv. Co.*, 67 Colo 555, 189 P 22. But see *Ex parte Bank of Monroe (NY)* 7 Hill 177; *Taylor v Sutherlin-Meade Tobacco Co.*, 107 Va 787, 60 SE 132 (holding that requirement was not satisfied by the mere addition of a descriptive term to the affiant's name, since this did not constitute an allegation under oath as to the fact of affiant's capacity).

**Annotation:** 47 ALR2d 423 § 10 (affidavit for service by publication).

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## § 5 Persons acting on behalf of corporation—Officers

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A corporation is incapable of taking an oath except through some individual acting in its behalf, that is, through its officers or agents. Consequently, it must necessarily be inferred that an officer, agent, or attorney of a corporation may make a requisite affidavit in its behalf, even though the statute regulating the making of affidavits makes no provision or exception in favor of corporations. 32 Where the affidavit is made by an officer of the corporation, as distinguished from a mere agent, it is generally considered to be the affidavit of the corporation itself. The theory is that the corporation, when acting in this regard through its officers, is acting *per se*, and not *per alium*. 33 This makes it unnecessary for the officers of corporations to comply with statutory requirements respecting the making of affidavits by agents and attorneys. 34 Thus, statutes providing that when an affidavit is made by an agent or attorney, the affiant should state why it is not made by the party, 35 or requiring agents and attorneys, when swearing to pleadings for their principals or clients, to disclose their knowledge and its sources, 36 do not apply to an affidavit made by an officer of a corporation on its behalf, although the latter requirement may be applicable where the statement of the officer is made on information and belief. 37 An officer must, of course, be possessed of the

requisite knowledge, 38 but such knowledge on his part is presumed. 39

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## Footnotes

Footnote 32. *Re Ben Weiss Co.* (CA7 Ill) 271 F2d 234; *Jotter v Charles B. Marvin Inv. Co.*, 67 Colo 555, 189 P 22; *Commercial Ins. Co. v Mehlman*, 48 Ill 313; *Hornick v Union P. R. Co.*, 85 Kan 568, 118 P 60; *Re McGill's Estate*, 52 Nev 35, 280 P 321, 65 ALR 1232 (holding that the affidavit required of an administrator may, in the case of a corporation, be made by an officer, in view of the implied powers of a corporation to do the acts necessary to enable it to exercise the powers expressly conferred); *Shaft v Phoenix Mut. Life Ins. Co.*, 67 NY 544; *Fayette Land Co. v Louisville & N. R. Co.*, 93 Va 274, 24 SE 1016.

**Annotation:** 47 ALR2d 423 § 7 (affidavit for service by publication).

As to verification of pleadings by corporations, see 19 Am Jur 2d, Corporations § 1479.

**Practice Aids:** –General forms of affidavit by officer of corporation. 1 Am Jur Legal Forms 2d, Affidavits and Declarations § 13:122; 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Form 122.

Footnote 33. *American Soda Fountain Co. v Stolzenbach*, 75 NJL 721, 68 A 1078.

As to necessity of statement as to authority to make affidavit, see § 7.

Footnote 34. *Hopper v Lovejoy*, 47 NJ Eq 573, 21 A 298.

As to affidavits on behalf of corporation by agents and attorneys, see § 6.

Footnote 35. *Hornick v Union P. R. Co.*, 85 Kan 568, 118 P 60.

As to requirement that affidavit made by agent or attorney state why it is not made by party, see § 4.

Footnote 36. *Henry v Brooklyn H. R. Co.*, 43 Misc 589, 89 NYS 525, affd 97 App Div 631, 89 NYS 1106; *Bank v Hutchinson & Hutchinson*, 87 NC 22; *Andrews v Blue Ridge Packing Co.*, 206 Pa 370, 55 A 1059.

As to requirement that agents making affidavits disclose special knowledge and sources thereof, see § 4.

Footnote 37. *Marine Nat. Bank v Ward* (NY) 35 Hun 395.

As to necessity for additional allegations as to the source of the affiant's information and the grounds of his belief, where an affidavit is made on information and belief generally, see § 22.

Footnote 38. *United Bonding Ins. Co. v Dura-Stress, Inc.* (Fla App D2) 243 So 2d 244; *American Soda Fountain Co. v Stolzenbach*, 75 NJL 721, 68 A 1078.

**Annotation:** 47 ALR2d 423 § 7 (affidavit for service by publication).

Footnote 39. United Bonding Ins. Co. v Dura-Stress, Inc. (Fla App D2) 243 So 2d 244.

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## **§ 6 --Corporate agents or attorneys**

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Generally, an affidavit made by an agent or attorney of a corporation, rather than by an officer whose act is regarded as the act of the corporation, is subject to the stricter statutory requirements generally applicable to affidavits executed by agents or attorneys. Thus, if the local statutes require that an affidavit made by an agent or attorney show why it was not made by his principal or client, an affidavit made by an agent or attorney on behalf of a corporation must show why it was not made by an officer of the corporation.

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Another important consideration in determining the sufficiency of an affidavit made by an agent or attorney who is not an officer is whether or not the facts alleged are within the personal knowledge of the affiant. If not, unless the allegations are upon information and belief and unless such allegations are permissible in the proceeding in which the affidavit is employed, it will be insufficient. 41 Generally, the agent's personal knowledge of the facts sworn to will not be presumed, and, therefore, the means and sources of his information should be shown. 42

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### **Footnotes**

Footnote 40. Wakely v Sun Ins. Office, 246 Pa 268, 92 A 136, 3 ALR 128.

As to affidavits made by agents or attorneys generally, see § 4.

As to necessity of statement as to authority to make affidavit, see § 7.

Footnote 41. Wakely v Sun Ins. Office, 246 Pa 268, 92 A 136, 3 ALR 128.

As to necessity that affiant state facts within his knowledge generally, see § 20.

Footnote 42. Columbia Screw Co. v Warner Lock Co., 138 Cal 445, 71 P 498; Mintz v Tri-County Natural Gas Co., 259 Pa 477, 103 A 285.

Agent should disclose what knowledge or opportunities for knowledge he had of the matters alleged. Wakely v Sun Ins. Office, 246 Pa 268, 92 A 136, 3 ALR 128.

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## **§ 7 --Necessity of statement as to authority to make affidavit**

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On the question of the necessity of an officer or agent of a corporation disclosing his authority to make an affidavit on its behalf, some courts hold that the mere fact or showing that the affiant is an agent or officer of the corporation does not establish his authority to execute an affidavit, and they require a specific averment of the fact that the affiant is the agent of the corporation in this particular matter, 43 or that his authority from the corporation to make the affidavit in some manner affirmatively appear. 44 Affidavits signed by officers who merely add to their signatures their official designation such as "president," "vice president," etc., are, according to these courts, insufficient in the absence of some averment showing authority to make the affidavit; 45 if this is required in the case of officers, it is obviously necessary that agents who are not officers state their authority to make the affidavit. Some cases hold, however, that the corporate agent's authority to make the affidavit may sufficiently appear aliunde. 46 Other courts take the view that authority to make an affidavit for a corporation will be inferred from the fact that the person making it is an officer of the corporation, and that it is unnecessary for him to recite that he is the agent of the company or that he is specifically authorized to make the affidavit. 47

As to whether or not there is a sufficient showing that the affiant is, in fact, the officer he purports to be, where this fact is merely recited in the unsworn part of the affidavit or indicated by a descriptive title attached to his signature, but is not affirmatively alleged in the sworn part of the affidavit, the courts are not agreed. Some have held such a showing sufficient, 48 while others have held that the official capacity of the affiant should be shown under oath. 49

The question has been raised, whether the officer who makes an affidavit on behalf of a corporation must show that he was such officer at the time the transaction referred to in the affidavit arose. This seems to be unnecessary where the statement is a positive assertion of personal knowledge, or is based upon information derived from the corporate books and records. 50

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## **§ 7 --Necessity of statement as to authority to make affidavit [SUPPLEMENT]**

**Practice Aids:** Capacity of affiant—Agent—Of bank. 1B Am Jur Pl & Pr Forms (Rev), Affidavits, § 116.

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### **Footnotes**

Footnote 43. *Hutson v Illinois C. R. Co.*, 186 Ala 436, 65 So 62; *Quigley v Central P. R. Co.*, 11 Nev 350; *Jones & Co. v C. W. Hancock & Sons*, 117 Va 511, 85 SE 460, 3 ALR 126.

No officer of a corporation, unless specially authorized, has power to bind the corporation, except in the discharge of his ordinary duties. *Mahone v Manchester & L.*

R. Corp., 111 Mass 72.

In *Shaft v Phoenix Mut. Life Ins. Co.*, 67 NY 544, it was held that where the person verifying a petition on behalf of a corporation swore that he was the general manager and agent of the corporation, such declaration went far to show that he had the authority to make the affidavit, and when, in addition, it appeared that the affidavit was produced and formally procured by the attorneys of record for the corporation, acting authoritatively, the sanction and authority of the corporation were impressed upon it.

Footnote 44. *Mahone v Manchester & L. R. Corp.*, 111 Mass 72; *Quigley v Central P. R. Co.*, 11 Nev 350.

As to authority of officers and agents of corporations generally, see 19 Am Jur 2d, Corporations §§ 1163 et seq.

**Practice Aids:** –Allegation as to capacity of affiant as officer of corporation. 1 Am Jur Legal Forms 2d, Affidavits and Declarations § 13:144.

–Allegations as to capacity of affiant as agent or attorney for corporation. 1 Am Jur Legal Forms 2d, Affidavits and Declarations §§ 13:145, 13:146; 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Forms 94 et seq.

Footnote 45. *Jones & Co. v C. W. Hancock & Sons*, 117 Va 511, 85 SE 460, 3 ALR 126.

The president of a corporation has been held not to have agency per se to execute the affidavit, within the provisions of a statute requiring the affidavit of the plaintiff or his agent. *Jones & Co. v C. W. Hancock & Sons*, 117 Va 511, 85 SE 460, 3 ALR 126.

Where a statute authorizes an affidavit to be made by a "party, his agent or attorney," the secretary or treasurer of a corporation should specifically allege that he is the agent of the corporation in the particular matter, in addition to stating his official capacity, since a court cannot take judicial notice of the fact that he is also its agent in the matter by virtue of his office. *Taylor v Sutherlin-Meade Tobacco Co.*, 107 Va 787, 60 SE 132.

Footnote 46. *Melcher v Scruggs*, 72 Mo 406; *Erie Boot & Shoe Co. v Eichenlaub*, 127 Pa 164, 17 A 889.

Footnote 47. *Old Settlers Invest. Co. v White*, 158 Cal 236, 110 P 922; *Casavant & Cloutier Co. v Smith*, 115 Me 168, 98 A 577; *American Soda Fountain Co. v Stolzenbach*, 75 NJL 721, 68 A 1078.

As to view that when a corporation makes an affidavit through its officers it is acting per se and not per alium, see § 5.

Footnote 48. *Old Settlers Invest. Co. v White*, 158 Cal 236, 110 P 922.

Footnote 49. *Wilmington Sash & Door Co. v Taylor*, 25 Del 528, 82 A 86.

Footnote 50. *E. & H. T. Anthony & Co. v Fox*, 53 App Div 200, 65 NYS 806.

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### III. TAKING THE AFFIDAVIT [8-11]

#### **Research References**

ALR Quick Indexes, Affidavits

Federal Quick Index, Affidavits

L Ed Index to Annotations, Affidavits

1 Am Jur Pl & Pr Forms (Rev), Affidavits, Forms 21 et seq.

1 Am Jur Legal Forms 2d, Affidavits and Declarations §§ 13:31 et seq.

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#### **§ 8 Generally; who may take affidavit**

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It has been stated that in the absence of a statute or rule of court requiring that an affidavit be taken before a specified person, anyone authorized to administer an oath may take an affidavit. 51 However, in most instances, statutes require that affidavits be taken before certain specified officers. 52

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#### **§ 8 ----Generally; who may take affidavit [SUPPLEMENT]**

**Practice Aids:** Affidavit—Before notary public. 1B Am Jur Pl & Pr Forms (Rev), Affidavits, § 141.

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#### **Footnotes**

Footnote 51. Marine Wharf & Storage Co. v Parsons, 49 SC 136, 26 SE 956.

A minor, if eligible to hold a ministerial office which carries with it the duty of administering oaths and affirmations, is competent to take affidavits in such capacity. Harkreader v State, 35 Tex Crim 243, 33 SW 117.

As to right to amend affidavit where person taking it was disqualified, see § 27.

As to authority to administer oaths, see 58 Am Jur 2d, Oath and Affirmation § 7.

As to power of notaries public to take affidavits, see 58 Am Jur 2d, Notaries Public § 19.

As to power of court clerks to take affidavits in criminal proceedings, see 15A Am Jur 2d, Clerks of Court § 22.

Footnote 52. Where the statute requires that affidavits in extradition proceedings must be made before a magistrate, one made before a notary public is insufficient. Ex parte Owen, 10 Okla Crim 284, 136 P 197. It has been held, however, that the phrase in the

statute, "made before a magistrate," means in the presence of the magistrate, not that he must actually administer the oath. *Ex parte Davis*, 333 Mo 262, 62 SW2d 1086, 89 ALR 589.

A United States postmaster is not an officer authorized to administer the oath to an absent voter within the meaning of a statute providing that such oath be made before an officer authorized by law to administer oaths and having an official seal. *Torkelson v Byrne*, 68 ND 13, 276 NW 134, 113 ALR 1213.

As to validity of affidavit taken before disqualified officer, see § 27.

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## § 9 --Attorney for affiant

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In many jurisdictions, the competency or incompetency of an attorney for a party to an action or proceeding to take the party's affidavit is expressly regulated by statute, and the modern trend is in favor of the attorney's competency. 53

In the absence of such a statute, some American courts have adhered to the rule that an attorney cannot take his client's affidavit to a paper to be filed in the cause, holding that if he does so, the affidavit will not be received. 54 Other cases have asserted that the common law does not prohibit an attorney who is otherwise authorized to administer an oath from taking his client's oath as to papers filed in the cause. 55 The issue has also been decided on the basis of whether or not the attorney taking the affidavit must, in connection therewith, perform some other act involving the exercise of judicial discretion. 56

The courts which have adopted the rule excluding the affidavits of a party to a cause taken before a notary who is his attorney in the action have confined the rule within narrow limits. Thus, the rule does not apply where the suit has not been commenced at the time the affidavit is taken, 57 and this limitation has also been applied where the prohibition is imposed by statute. 58 There is a split in authority as to whether the rule extends to a notary who is a clerk or other employee in the office of the affiant's attorney. 59 Furthermore, where an affidavit is taken in violation of the rule, most courts hold that it is not a nullity and void, but merely irregular and voidable. 60 The view that the affidavit taken before the affiant's attorney is merely voidable is applied by many courts in the construction of a statute prohibiting the attorney from taking the affidavit of his client. 61

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## Footnotes

Footnote 53. The reader should consult the statutes of his own jurisdiction in this respect.

For discussion of qualification of attorney to administer oath to client, see 58 Am Jur 2d, Oath and Affirmation § 10.

Footnote 54. *Storz Brewing Co. v Kuester*, 178 Neb 135, 132 NW2d 341, 21 ALR3d 476 (holding that a notary public who is an attorney of record in a pending action is not a proper officer to take an affidavit to be used as evidence in the cause); *Crawford v Ferguson*, 5 Okla Crim 377, 115 P 278; *Ex parte King*, 135 Tex 296, 143 SW2d 580 (complaint for disobedience of child support order, sworn to before complainant's attorney, held void).

**Annotation:** 21 ALR3d 483 § 2.

The attorney for the accused cannot take the verification of affidavits in support of a motion for a new trial in a criminal case. *Nothaf v State*, 91 Tex Crim 378, 239 SW 215, 23 ALR 1374.

Affidavits of misconduct of the jury in support of a motion for a new trial are not sufficient when taken before an attorney for the appellant. *Snow v State*, 91 Tex Crim 1, 237 SW 563, 20 ALR 1180.

Footnote 55. *Birmingham v Simmons*, 222 Ala 111, 130 So 896, 74 ALR 766, motion den 222 Ala 309, 132 So 322, 74 ALR 771; *State ex rel. Taubman v Davis*, 199 Mo App 439, 203 SW 654.

**Annotation:** 21 ALR3d 483 § 2.

In West Virginia no statute or court rule disqualifies an attorney who, without more, represents his client in a pending case from taking the affidavit of his client for use in the case. Neither is such action forbidden by any provision of the Canons of Ethics of the American Bar Association or the rules and regulations of the West Virginia State Bar or by the constitution and the bylaws of the West Virginia Bar Association. It is common knowledge that the practice is widespread and of long standing among the members of the legal profession in this state. *Calhoun County Bank v Ellison*, 133 W Va 9, 54 SE2d 182.

In *Application of Martin*, 76 Idaho 179, 279 P2d 873, 53 ALR2d 582, the court said that it found no merit in the contention that an affidavit initiating contempt proceedings was invalid because sworn to before one of the counsel for the affiant, acting as a notary public.

Footnote 56. *McDonald v Willis*, 143 Mass 452, 9 NE 835 (attorney qualified where act was substantially ministerial, not involving or requiring any hearing, decision, or adjudication); *Duncan v Duncan* (Tex Civ App Austin) 300 SW2d 149, writ dism w o j (attorney swearing client to plea of privilege was not disqualified since he was performing only a ministerial act).

**Annotation:** 21 ALR3d 483 §§ 6[a], 10[a].

Footnote 57. *Petition of Jackson* (CA6 Ohio) 18 F2d 462; *Becker v Hopper*, 22 Wyo 237, 138 P 179, adhered to 23 Wyo 209, 147 P 1085 and (ovrld on other grounds *Schaefer v Lampert Lumber Co.* (Wyo) 591 P2d 1225).

**Annotation:** 21 ALR3d 483 § 12[a].



This exception does not apply, however, to a case where the affidavit is taken as a simultaneous step in the institution of proceedings, as in the case of an affidavit for attachment. It has been held that a notary who was attorney for the plaintiff could not take the affidavit of his client for the purpose of procuring an attachment. *Horkey v Kendall*, 53 Neb 522, 73 NW 953.

Footnote 58. *Allen v West Bay City*, 140 Mich 111, 103 NW 514 (claim against a city for personal injuries); *Sullivan v Hall*, 86 Mich 7, 48 NW 646 (affidavit to a notice of a logger's lien).

Footnote 59. *MacKenzie v MacKenzie*, 238 Ill 616, 87 NE 848, error dismd 215 US 582, 54 L Ed 337, 30 S Ct 398 (clerk, authorized); *Wuerth v Wuerth*, 264 Mich 640, 250 NW 520 (clerk and stenographer, disqualified).

**Annotation:** 21 ALR3d 483 § 14[a].

An office employee of one of the attorneys is not disqualified from taking an affidavit. *Educators Mut. Ins. Co. v Serosky*, 73 Pa D & C 337.

Footnote 60. *Shanholtzer v Thompson*, 24 Okla 198, 103 P 595.

**Annotation:** 21 ALR3d 483.

There is a clear distinction between the administration of an oath by one not authorized to administer oaths and the administration of an oath by one generally authorized, but forbidden to do so in a particular case. In the first case, no power exists and the act is a nullity; in the other, the power exists, but it has been wrongfully exercised. *Horkey v Kendall*, 53 Neb 522, 73 NW 953 (also holding that if a timely objection is not interposed, it will ordinarily be deemed waived).

As to right to amend affidavit taken before officer who was disqualified, see § 27.

Footnote 61. *Horkey v Kendall*, 53 Neb 522, 73 NW 953 (holding that an affidavit for attachment sworn to before a notary who was also the plaintiff's attorney cannot be attacked in a collateral proceeding); *Shanholtzer v Thompson*, 24 Okla 198, 103 P 595.

**Annotation:** 21 ALR3d 483.

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## § 10 --Foreign affidavits

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Affidavits taken in a foreign state or country may be used in a proceeding in the forum, 62 but the law of the forum governs with respect to who may take a foreign affidavit. 63 Local statutes or court rules usually impose various requisites upon the making of such affidavits as a condition of their use in local judicial determinations. They frequently

designate the officers before whom affidavits may be taken in a foreign state. 64 These statutes are controlling, and such affidavits must be taken substantially in accordance therewith. 65 In the absence of such a statute, a presumption may be followed that the law of the foreign state is the same as the law of the forum with regard to what officers are authorized to administer oaths for purposes of taking an affidavit in the foreign state. 66 On the other hand, some courts hold that in the absence of such a provision, a foreign affidavit may be taken before any officer authorized by the laws of the foreign state to administer oaths. 67

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## Footnotes

Footnote 62. *Gibson v Tilton* (Md) 1 Bland Ch 352.

As to authentication of authority of foreign officer, see § 19.

Footnote 63. *Love v McAlister*, 42 Ark 183.

The act of the foreign official in taking an affidavit for use within the domestic forum is considered as having been done under the authority of the latter, and not under that of the foreign state. This matter rests upon the principle of comity between the states, and does not fall within the provision of the federal Constitution or acts of Congress regulating the authentication of judicial proceedings in sister states. *Gibson v Tilton* (Md) 1 Bland Ch 352.

Footnote 64. *Simpson v Wicker*, 120 Ga 418, 47 SE 965; *Mineral P. R. Co. v Keep*, 22 Ill 9.

Footnote 65. *Wood v St. Paul City R. Co.*, 42 Minn 411, 44 NW 308.

Footnote 66. *Torkelson v Byrne*, 68 ND 13, 276 NW 134, 113 ALR 1213.

Footnote 67. *Wood v St. Paul City R. Co.*, 42 Minn 411, 44 NW 308.

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## § 11 Administering oath or affirmation

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It is essential to the validity of an affidavit that it be sworn to, or affirmed before, some officer authorized to administer oaths or affirmations. 68 There must be something which amounts to the administration of an oath or affirmation, and this requires concurrent action on the part of the affiant and an authorized officer. 69 Either the oath must be administered by the officer to the affiant, or asseveration must be made to the truth of the matters contained in the affidavit by the party making it, to the officer, with the latter's consent. 70

Considerable latitude is generally allowed as to the form in which the oath or affirmation may be administered, 71 and a substantial compliance therewith is sufficient. 72 If the attention of the person making the affidavit is called to the fact that it must be sworn to and, in recognition of this, he is asked to do some corporal act and he does it, the instrument constitutes a statement under oath, irrespective of any other formalities. 73

◆ **Caution:** Some form remains essential to distinguish an affidavit from a bare declaration. If the conduct of the parties is of such an equivocal nature that it may or may not have been accompanied by an intention to take an oath or affirmation, it is not sufficient. To make a valid oath or affirmation, there must be some overt act which shows that there was an intention to take an oath or affirmation on the one hand and an intention to administer it on the other; mere intention, not accompanied by an unambiguous act, is insufficient. 74

In making an affidavit, the law requires that both the affiant and the paper sworn to be in the personal presence of the officer administering the oath. 75 Accordingly, the oath of the affiant cannot be taken over the telephone. 76

The mere fact that the affidavit is taken through the medium of an unsworn interpreter does not affect its validity, for in taking an affidavit, an interpreter is considered the agent of the affiant, and consequently need not be sworn as in the case of an interpreter engaged in the trial of a case or in the taking of a deposition, where the oath is required because he acts as an officer of the court. 77

Although the Sunday laws in the various jurisdictions vary as to their scope, 78 as a general rule an affidavit is not invalid merely because it was taken on Sunday. 79

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## **§ 11 ----Administering oath or affirmation [SUPPLEMENT]**

**Practice Aids:** Moynihan, Affidavit Evidence. 14 Litig 3, Spring, 1988.

### **Statutes:**

28 USCS § 1746 provides that whenever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the form prescribed the statute.

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### **Footnotes**

Footnote 68. Thompson v Self, 197 Ark 70, 122 SW2d 182; Kirk v Hartlieb, 193 Ark 37, 97 SW2d 434; Manuel v McKissack (1st Dist) 60 Ill App 3d 654, 18 Ill Dec 66, 377 NE2d 219; State ex rel. State Bar Ass'n v Finn, 32 Or 519, 52 P 756; Tacoma Grocery

Co. v Draham, 8 Wash 263, 36 P 31.

A verification is a sworn statement of the truth of the facts stated in the instrument verified. It always involves the administration of an oath. *Bell & Zajicek, Inc. v Heyward-Robinson Co.*, 23 Conn Supp 296, 182 A2d 339.

**Practice Aids:** –Introductory statements in affidavits identifying affiant and indicating oath has been taken. 1 Am Jur Legal Forms 2d, Affidavits and Declarations §§ 13:32 et seq.; 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Forms 21 et seq.

Footnote 69. *Thompson v Self*, 197 Ark 70, 122 SW2d 182; *Kirk v Hartlieb*, 193 Ark 37, 97 SW2d 434.

Footnote 70. *State ex rel. State Bar Ass'n v Finn*, 32 Or 519, 52 P 756.

Footnote 71. *United States v Mallard* (DC SC) 40 F 155; *State ex rel. State Bar Ass'n v Finn*, 32 Or 519, 52 P 756.

Footnote 72. *Hyde v Adams*, 80 Ala 111; *Hugo v Miller*, 50 Minn 105, 52 NW 381; *Ward v Brooklyn*, 32 App Div 430, 53 NYS 41, affd 164 NY 591, 58 NE 1093.

Footnote 73. *United States v Mallard* (DC SC) 40 F 151; *Thompson v Self*, 197 Ark 70, 122 SW2d 182; *Cox v State*, 164 Ark 126, 261 SW 303.

Where an affiant signed his name to a statement wherein he stated on oath that he had read the attached document, that he knew its contents, and that they were true, it was held that the statement constituted proof that he was conscious of the fact that he was swearing to the correctness of the attached document, and the document was verified according to law, even though the notary, instead of executing a jurat, executed a certificate of acknowledgment. *Dalbey Bros. Lumber Co. v Crispin*, 234 Iowa 151, 12 NW2d 277.

Footnote 74. *O'Reilly v People*, 86 NY 154; *St. Louis, B. & M. R. Co. v Dallas Cooperage & Woodenware Co.* (Tex Civ App) 268 SW 769.

Purported affidavits were held insufficient where one affiant testified that there was nothing in his signing to lead him to believe that he was under oath, and another testified that he did not know that the party before whom the affidavit was signed was a notary until after he had signed it and left the office. *Thompson v Self*, 197 Ark 70, 122 SW2d 182.

See, however, *State v Hopkins*, 149 SC 494, 147 SE 595, holding that where an affidavit supporting a warrant of arrest was sent by a magistrate to the affiant, who signed it and returned it, but did not personally appear before the magistrate, and where the objection was first raised, after the conviction of the accused, upon a motion for a new trial (it appearing that the movant had not exercised the degree of diligence incumbent upon him under the circumstances), the affiant had ratified the affidavit, and that the warrant was valid and sufficient to authorize the arrest of the accused.

Footnote 75. Where signatures are obtained as in ordinary petitions and are then carried to an officer authorized to administer oaths, who signs his name to the jurat, the

purported affidavit is insufficient. Kirk v Hartlieb, 193 Ark 37, 97 SW2d 434.

Footnote 76. Thompson v Self, 197 Ark 70, 122 SW2d 182.

As to acknowledgment over telephone, see 1 Am Jur 2d, Acknowledgments § 31.

Footnote 77. Davis v First Nat. Bank, 6 Indian Terr 124, 89 SW 1015.

Footnote 78. See 73 Am Jur 2d, Sundays and Holidays §§ 5 et seq.

Footnote 79. State v Conwell, 96 Me 172, 51 A 873; State v California Mining Co., 13 Nev 203 (affidavit to appeal bond).

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## IV. CONSTITUENT PARTS [12-26]

### A. Formal Requisites [12-20]

#### Research References

ALR Quick Indexes, Affidavits

Federal Quick Index, Affidavits

L Ed Index to Annotations, Affidavits

1 Am Jur Pl & Pr Forms (Rev), Affidavits, Forms 1 et seq., 81, 82, 125, 126

1 Am Jur Legal Forms 2d, Affidavits and Declarations §§ 13:11 et seq., 13:121 et seq.

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### § 12 Generally

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The chief essentials of an affidavit are that it be in writing, and that it be sworn to, or affirmed before, some legally authorized officer. 80 No particular form is required at common law. The statutes, however, usually prescribe various formal requisites. 81 But whether at common law or under statute, every affidavit has, aside from the body of the instrument, certain component parts which may be either proper or absolutely essential, according to the law of the particular jurisdiction; they are usually designated as the caption or title, the venue, the signature of the affiant, and the jurat, which properly includes the authentication. 82

Mere clerical omissions which do not obscure the meaning will not invalidate an affidavit, 83 nor do technical deficiencies render affidavits improper; substance and not form controls. 84

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### § 12 ----Generally [SUPPLEMENT]

**Practice Aids:** Affidavit—Before notary public. 1B Am Jur Pl & Pr Forms (Rev), Affidavits, § 141.

### **Case authorities:**

Verified complaint may be used as opposing affidavit under FRCP 56; to function as opposing affidavit, verified complaint must be based on personal knowledge and set forth specific facts admissible in evidence. *Schroeder v McDonald* (1995, CA9 Hawaii) 55 F3d 454, 95 CDOS 3701.

Motion to strike affidavits was properly denied, where unsworn declarations state in final sentence that "under penalty of perjury ... foregoing is true and correct to best of my knowledge and belief," because such documents meet verification requirements of 28 USCS § 1746. *Kersting v United States* (1994, DC Hawaii) 865 F Supp 669, 95-1 USTC ¶ 50077, 74 AFTR 2d 94- 5703, 94 TNT 158-19, judgment entered, complaint dismd (1994, DC Hawaii) 1994 US Dist LEXIS 15615.

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### **Footnotes**

Footnote 80. *Thompson v Self*, 197 Ark 70, 122 SW2d 182; *Kirk v Hartlieb*, 193 Ark 37, 97 SW2d 434.

Footnote 81. *Shelton v Berry*, 19 Tex 154.

**Practice Aids:** —General forms of affidavits. 1 Am Jur Legal Forms 2d, Affidavits and Declarations §§ 13:121 et seq.; 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Forms 121 et seq.

Footnote 82. *Beebe v Morrell*, 76 Mich 114, 42 NW 1119.

An affidavit implies that the person making the affidavit has taken an oath, and where absentee voters merely signed a form of affidavit, there was no actual affidavit inasmuch as they took no oath, no oath was administered to them, the paper signed by them was not attested by the city clerk, and no jurat was attached. *Fugate v Buffalo* (Wyo) 348 P2d 76, 97 ALR2d 243.

As to checklist of matters to be included in an affidavit, see § 20.

As to statement of facts, see §§ 20 et seq.

Footnote 83. An affidavit in support of a sworn account was not fatally defective because it failed to identify, in its introduction, the signer of the affidavit as the person who appeared before the notary public where the affidavit was signed by the affiant and the omission was cured by adding the words "sworn to and subscribed before me" immediately below the signature line; the notary thus attested both the signature and the swearing and it would be reasonable to presume that the signing individual was also the affiant. *Minyard v Southern Pipe & Supply Co.* (Tex Civ App Dallas) 563 SW2d 332, writ ref n r e.

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### § 13 Caption or title

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If an affidavit is prepared for use in a pending action, the courts generally require that it bear a caption, or heading, which states the title of the cause in which it is to be used, specifying the court and the names of the parties. 85 Some courts have held, however, that, even assuming that the affidavit should be entitled in a pending action, its omission is of no consequence if the affidavit is fully identified, either by reference to other papers duly entitled, or by affirmative intrinsic evidence contained in the body of the instrument, since its purpose is to identify the suit in which the affidavit is designed to be used. 86 Even further, there is authority to the effect that a caption is not necessary. 87 If, however, the affidavit is entitled in some other cause, it is a nullity. 88

The test of the sufficiency of the caption where required is said to be whether or not such affidavit could be used as a foundation for a prosecution for perjury. 89 However, in view of the fact that perjury has been extended by statute so that the crime is not limited to sworn statements in judicial proceedings, 90 it may be questioned whether or not the caption should retain its common-law significance. Obviously, there can be no requirement of a caption where no cause is pending. 91

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### Footnotes

Footnote 85. Dollar v Thompson, 212 Ga 831, 96 SE2d 493 (holding that an affidavit which contained no caption as required by statute was not properly recorded thereunder and was not entitled to the recognition provided for in the statute); Beebe v Morrell, 76 Mich 114, 42 NW 1119.

**Practice Aids:** –Captions for affidavits. 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Forms 1 et seq.

Footnote 86. Hill v McBurney Oil & Fertilizer Co., 112 Ga 788, 38 SE 42; Beebe v Morrell, 76 Mich 114, 42 NW 1119.

Footnote 87. Hertig v People, 159 Ill 237, 42 NE 879.

Footnote 88. Beebe v Morrell, 76 Mich 114, 42 NW 1119.

Footnote 89. Hill v McBurney Oil & Fertilizer Co., 112 Ga 788, 38 SE 42; Beebe v Morrell, 76 Mich 114, 42 NW 1119.

Footnote 90. See 60 Am Jur 2d, Perjury § 21.

Footnote 91. Beebe v Morrell, 76 Mich 114, 42 NW 1119.

A verified information properly should not be entitled of any cause, since it is only laying the matter before the court to obtain its direction and no parties are yet made; however, if it is so entitled, this is but a formal defect, and not a matter of substance upon which error may be assigned. State ex rel. Dox v Board of Equalization, 10 Iowa 157.

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## § 14 Venue

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Venue, in respect of an affidavit, is the designation of the place where the affidavit was taken. It is prima facie evidence of such fact. 92 Its purpose is to show whether the official administering the oath or affirmation has acted within his jurisdiction, 93 and it also serves to indicate the county for which the officer, in the case of a notary, has been appointed, in order that it may be ascertained whether the person who acts as a notary is such in fact. 94 Generally, however, the courts do not regard the absence of a formal statement of the venue as fatal to the validity of the affidavit. An affidavit is sufficient if the place where it is taken is indicated, expressly or by implication, by the rest of the instrument. 95 This may sufficiently appear from the notarial seal. 96 And the necessity of the venue is further obviated by the presumption made by many courts that a notary public has not violated the law and has acted within his jurisdiction whether such jurisdiction is confined to a particular county 97 or whether it extends throughout the state, 98 or whether such officer is a notary of a foreign state. 99 Another influencing factor is the rule that a court will take judicial notice of the notaries within the county in which the court is held, 1 and, in some jurisdictions, within the entire state. 2

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## Footnotes

Footnote 92. Manufacturers' & Mechanics' Bank v Cowden (NY) 3 Hill 461.

**Practice Aids:** –Statements of venue for affidavits. 1 Am Jur Legal Forms 2d, Affidavits and Declarations §§ 13:22 et seq.; 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Forms 11 et seq.

Footnote 93. Cox v Stern, 170 Ill 442, 48 NE 906; Hertig v People, 159 Ill 237, 42 NE 879.

Footnote 94. Sullivan v Hall, 86 Mich 7, 48 NW 646.

Footnote 95. Meldrum v United States (CA9 Or) 151 F 177; Cox v Stern, 170 Ill 442, 48 NE 906.

Footnote 96. Cox v Stern, 170 Ill 442, 48 NE 906.

Footnote 97. Cox v Stern, 170 Ill 442, 48 NE 906; Hertig v People, 159 Ill 237, 42 NE



879; Bensimer v Fell, 35 W Va 15, 12 SE 1078.

Footnote 98. Sullivan v Hall, 86 Mich 7, 48 NW 646.

Furthermore, where a notary has authority to act throughout the state, and the record of his appointment is kept in the office of the secretary of state, where it may always be ascertained whether one is a notary in fact, the place where the affidavit is taken need not be indicated, nor need the notary indicate the county of his residence. Sullivan v Hall, 86 Mich 7, 48 NW 646.

Footnote 99. Teutonia Loan & Bldg. Co. v Turrell, 19 Ind App 469, 49 NE 852 (where the venue was laid as of Marion County, Indiana, but the jurat of the notary was subscribed by him as a notary of Hamilton County, Ohio, the presumption that the officer acted within his jurisdiction was controlling).

Footnote 1. Cox v Stern, 170 Ill 442, 48 NE 906.

Thus, an affidavit taken before one who was, in fact, a notary of the county in which the court was sitting has been held sufficient, although it contained no venue and nothing to indicate where it was taken, and the notary did not mention the county of his appointment or affix his seal. Hertig v People, 159 Ill 237, 42 NE 879.

Footnote 2. Sullivan v Hall, 86 Mich 7, 48 NW 646.

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## § 15 Signature of affiant

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In some jurisdictions, as a result of statutory definition or construction, <sup>3</sup> or of express enactment, the signature of the affiant is indispensable to the validity of an affidavit. The proper position of the signature is below the body of the affidavit, but it is not essential to the validity of the affidavit, even where a signature is required, that it be so placed; an affidavit has been held to comply sufficiently with the statute even though the signature, instead of being affixed below the body of the affidavit and above the jurat, is below the official signature of the notary, <sup>4</sup> and even where the signature appears at the beginning of the affidavit rather than at the end. <sup>5</sup> But where a statute required an affidavit to be "subscribed," and the signature appeared at the beginning, an affidavit was held invalid. <sup>6</sup>

◆ Recommendation: Although in the absence of a statute or rule of court to the contrary, it is not necessary to the validity of an affidavit that it have the signature of the affiant subscribed thereto, <sup>7</sup> all the authorities and general custom recommend, as the better practice, that it be signed by the affiant. <sup>8</sup>

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## § 15 ----Signature of affiant [SUPPLEMENT]

## Case authorities:

A document was a valid affidavit and satisfied notice provisions of the McGregor Act, where claimant's document contained a notice of claim, followed by a factual statement that the amounts shown in the claim were just and correct, and notary's signature below the jurat, certifying the sworn statement and affiant's signature, even though the person named in the document signed above the statement and not below it, because the signature was placed on the document for the purpose of subscribing to the instrument. *Acme Brick, Div. of Justin Industries, Inc. v Temple Assoc., Inc.* (1991, Tex App Waco) 816 SW2d 440, writ den (Dec 11, 1991).

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## Footnotes

Footnote 3. *Robertson v Robertson*, 270 Mo 137, 192 SW 988 (superseded by statute on other grounds as stated in *McCammon v McCammon* (Mo App) 680 SW2d 196).

Footnote 4. *State ex rel. Benton v Kirby* (Mo App) 106 SW2d 512; *Kohn v Washer*, 69 Tex 67, 6 SW 551.

**Practice Aids:** –Forms for signature of affiant. 1 Am Jur Legal Forms 2d, Affidavits and Declarations §§ 13:42, 13:43.

Footnote 5. *General Motors Acceptance Corp. v Sutherland*, 122 Neb 720, 241 NW 281 (the signature need not be at the end, if it appears in any part and is applicable to the whole circumstance of the affidavit).

Footnote 6. *Stone v Marvel*, 45 NH 481.

A motion to dismiss a simplified traffic information for lack of jurisdiction for failure to verify in compliance with statutory requirements was granted where the arresting officer signed above the words "Affirmed under penalty of perjury", as these words, following the signature of the arresting officer, were not sufficiently broad, nor did they spell out the sanction in a manner to awaken the conscience and impress the mind of the subscriber. *People v Lennox*, 94 Misc 2d 730, 405 NYS2d 581.

Footnote 7. *Huff v Commonwealth*, 213 Va 710, 194 SE2d 690.

Footnote 8. *Simmons Hardware Co. v Alturas Commercial Co.*, 4 Idaho 334, 39 P 550; *Pittsburgh, C. & S. L. R. Co. v Mahony*, 148 Ind 196, 46 NE 917, motion overr 148 Ind 207, 47 NE 464; *International Harvester Co. v Embody*, 89 Mont 402, 298 P 348; *People ex rel. New York City Omnibus Corp. v Miller*, 282 NY 5, 24 NE2d 722; *State v Higgins*, 266 NC 589, 146 SE2d 681.

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## § 16 Jurat

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With regard to an affidavit, the "jurat" is simply a certificate evidencing the fact that the affidavit was properly made before a duly authorized officer. 9

Although it has been said that, strictly speaking, the jurat is not part of the affidavit, but simply evidence that the affidavit has been duly sworn to by the affiant, 10 common prudence would dictate that a properly executed jurat be attached to every affidavit. 11

A particular form for the jurat may be prescribed by statute or rule of court; such a form should, of course, be followed. In the absence of such a statute or rule of court, no special form is required. 12 The usual and proper form is, "Subscribed and sworn to before me," followed by the date and the signature of the officer. 13 However, it has been held that the words "before me" are not necessary, as they are presumed from the statement "sworn to." 14 If the jurat shows an affirmation, the word "affirmed" will be sufficient. 15 But it has been held that a jurat which does not contain a statement that the matters stated in the affidavit are true and which is not made a part of an affidavit is insufficient to meet the requirements of a statute governing the verification of a claim against a municipal corporation for personal injuries. 16 The contents of the body of an affidavit are relevant to an assessment of a claimed deficiency in the jurat. 17

The jurat is *prima facie*, 18 and not conclusive evidence of the due administration of the oath, and the affidavit may be attacked and shown to be false. 19

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## Footnotes

Footnote 9. *Hoffman v Palm Springs* (4th Dist) 169 Cal App 2d 645, 337 P2d 521; *Cox v Stern*, 170 Ill 442, 48 NE 906; *James v Logan*, 82 Kan 285, 108 P 81; *Blackburn v Commonwealth*, 202 Ky 751, 261 SW 277 (ovrld on other grounds *Henson v Commonwealth* (Ky) 347 SW2d 546); *Wise v Yunker*, 223 Mich 203, 193 NW 890; *People ex rel. Fifth Ave. & 37th Street Corp. v Miller*, 261 App Div 550, 26 NYS2d 219, affd 286 NY 628, 36 NE2d 682; *Richardson v Ross*, 111 W Va 465, 163 SE 2.

Jurats are generally not competent to prove the identity of the affiant. *Allstate Sav. & Loan Asso. v Lotito* (2d Dist) 116 Cal App 3d 998, 172 Cal Rptr 535.

Footnote 10. *Cox v Stern*, 170 Ill 442, 48 NE 906; *Pappas v State*, 179 Ind App 547, 386 NE2d 718; *Hill v Floating Decks of America, Inc.* (Tex Civ App San Antonio) 590 SW2d 723; *Huff v Commonwealth*, 213 Va 710, 194 SE2d 690.

Footnote 11. *Cox v Stern*, 170 Ill 442, 48 NE 906.

As to effect of omission of jurat, see § 17.

Footnote 12. *James v Logan*, 82 Kan 285, 108 P 81.

Where it is the practice for the notary to include in the jurat a reference to his notarial seal, it has been intimated that the omission of such a reference would not be a defect. *Hallett v Chicago & N. R. Co.*, 22 Iowa 259.

**Practice Aids:** –Forms of jurat. 1 Am Jur Legal Forms 2d, Affidavits & Declarations §§ 13:61 et seq.; 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Forms 41 et seq.

Footnote 13. *Ramer v Wright*, 62 Colo 53, 159 P 1145, 1 ALR 1560 (holding that jurat reading, "Subscribed to before me" on a specified date, was insufficient, as not showing that an oath was administered, although the body of the affidavit stated that the signers "depone and say").

Footnote 14. *Black v Minneapolis & S. L. R. Co.*, 122 Iowa 32, 96 NW 984; *Sargent v Shepard*, 94 Vt 351, 111 A 447.

Footnote 15. *Colvin v People*, 166 Ill 82, 46 NE 737.

Footnote 16. *Hoffman v Palm Springs* (4th Dist) 169 Cal App 2d 645, 337 P2d 521.

Footnote 17. *Herrick v Theberge* (Me) 474 A2d 870 (holding that jurats, though sloppily prepared and not in strict conformity with procedural rules, were not fatally defective since contents of affidavit conformed with language of jurat).

Footnote 18. *Owens v Chaplin*, 229 NC 797, 48 SE2d 37 (a claim that the affiants were not sworn by the attesting officer when they signed their affidavits was not sustained where they were, in most cases, quite specific as to the fact that they had sworn, this was corroborated or supported by the attesting officer, and there was nothing in the record to show otherwise).

Footnote 19. *People v Northcott*, 209 Cal 639, 289 P 634, 70 ALR 806; *Cox v Stern*, 170 Ill 442, 48 NE 906; *People ex rel. Fifth Ave. & 37th Street Corp. v Miller*, 261 App Div 550, 26 NYS2d 219, affd 286 NY 628, 36 NE2d 682.

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## § 17 --Effect of omission

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Several variant views have been taken by the courts as to the effect upon the affidavit of the omission of a jurat or a signature thereto. According to one line of authority, such an omission is not fatal to the validity of the affidavit, so long as it appears, either from the rest of the instrument or from evidence aliunde, that the affidavit was, in fact, duly sworn to before an authorized officer. 20 This rule is based upon the principle that a party should not suffer by reason of the inadvertent omission of the officer to perform his duty, 21 and has been applied to affidavits for widely varying purposes. 22 Under this view, an affidavit defective by reason of the omission of the jurat or of the officer's signature may, upon proof of its authenticity, be cured by amendment. 23

In some jurisdictions, however, the omission of the jurat or of the signature thereto renders the affidavit void. 24 One view is that an affidavit with an invalid jurat is admissible as an unsworn statement if there is no requirement that the statement be sworn

for the purpose that it is offered. 25

Some courts have refused to allow a judgment to be attacked collaterally on the ground that a necessary affidavit in the proceedings contained no jurat, it being presumed that the affidavit was duly sworn to, 26 and it has also been held that an objection to the fact that an affidavit contained no jurat is made too late on appeal, as it will be presumed that the affidavit was sworn to. 27

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## Footnotes

Footnote 20. *Beach v Averett*, 106 Ga 73, 31 SE 806; *Cox v Stern*, 170 Ill 442, 48 NE 906; *Gossard v Vawter*, 215 Ind 581, 21 NE2d 416 (recognizing the rule, but refusing to apply it in the case of an election contest petition where the jurat was missing, on ground that it was a special proceeding and petitioner must bring himself strictly within the spirit as well as the letter of the statute); *James v Logan*, 82 Kan 285, 108 P 81; *Blackburn v Commonwealth*, 202 Ky 751, 261 SW 277 (ovrld on other grounds *Henson v Commonwealth* (Ky) 347 SW2d 546); *Wise v Yunker*, 223 Mich 203, 193 NW 890; *People ex rel. Fifth Ave. & 37th Street Corp. v Miller*, 261 App Div 550, 26 NYS2d 219, affd 286 NY 628, 36 NE2d 682; *Taxis v Oakwood* (App) 19 Ohio L Abs 498; *Richardson v Ross*, 111 W Va 465, 163 SE 2.

An instrument was held to be properly verified where the affiant signed a statement that on oath the allegations in the attached document were true, and the notary, instead of executing the attached jurat form, executed a certificate of acknowledgment, to the effect that the affiant acknowledged that he executed the instrument as his voluntary act and deed. *Dalbey Bros. Lumber Co. v Crispin*, 234 Iowa 151, 12 NW2d 277.

Footnote 21. *Dalbey Bros. Lumber Co. v Crispin*, 234 Iowa 151, 12 NW2d 277; *James v Logan*, 82 Kan 285, 108 P 81; *Blackburn v Commonwealth*, 202 Ky 751, 261 SW 277 (ovrld on other grounds *Henson v Commonwealth* (Ky) 347 SW2d 546); *Wise v Yunker*, 223 Mich 203, 193 NW 890; *Appeal of Cusick*, 136 Pa 459, 20 A 574.

Footnote 22. *Beach v Averett*, 106 Ga 73, 31 SE 806 (affidavit for distress warrant); *Cox v Stern*, 170 Ill 442, 48 NE 906 (affidavit for extension of chattel mortgage); *Dalbey Bros. Lumber Co. v Crispin*, 234 Iowa 151, 12 NW2d 277 (mechanic's lien with certificate of acknowledgment instead of jurat attached); *James v Logan*, 82 Kan 285, 108 P 81 (affidavit for attachment); *Young v Wooden*, 204 Ky 695, 265 SW 24 (affidavit for attachment); *Peterson v Fowler*, 76 Mich 258, 43 NW 10 (affidavit for replevin); *People ex rel. Fifth Ave. & 37th Street Corp. v Miller*, 261 App Div 550, 26 NYS2d 219, affd 286 NY 628, 36 NE2d 682 (affidavit to application to review tax assessment); *Appeal of Cusick*, 136 Pa 459, 20 A 574 (affidavits of voters in election contest); *Redman v Union P. R. Co.*, 3 Wyo 678, 29 P 88 (affidavit for appeal; signatures of affiant and of a justice of the peace allowed to be added by amendment).

Footnote 23. *Beach v Averett*, 106 Ga 73, 31 SE 806; *People ex rel. Fifth Ave. & 37th Street Corp. v Miller*, 261 App Div 550, 26 NYS2d 219, affd 286 NY 628, 36 NE2d 682; *Taxis v Oakwood* (App) 19 Ohio L Abs 498; *Appeal of Cusick*, 136 Pa 459, 20 A 574; *Richardson v Ross*, 111 W Va 465, 163 SE 2.

As to amendment of affidavits, see §§ 26, 27.

Footnote 24. Hill v Alliance Bldg. Co., 6 SD 160, 60 NW 752 (verification of claim for mechanic's lien; right to amend specifically denied).

An affidavit that does not show when the affiant swore to it could not show that he committed perjury and therefore is void. Yorko v State (Tex App Houston (14th Dist)) 672 SW2d 3.

Footnote 25. Pappas v State, 179 Ind App 547, 386 NE2d 718.

Footnote 26. See 46 Am Jur 2d, Judgments § 643.

Footnote 27. Neff v Alvin, 182 Ill App (abstract) 41.

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## § 18 Authentication; officer's signature and seal

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Where a jurat is subscribed by a notary public, the better practice would seem to be for it to be attested by the signature and seal of the notary, with a statement of the county for which he was appointed. 28 However, whether such an officer's authority must be authenticated by his official seal is a point as to which the courts are not agreed. In some jurisdictions, the courts require that the seal be affixed, 29 and in other jurisdictions this requirement is based on statute. 30 In the absence of statute, it is the rule in other jurisdictions that the notarial or official seal is not a requisite to the validity of the affidavit. 31

A court will take judicial notice of the notaries within its own county and, in some jurisdictions, within the entire state, 32 and it will, of course, take judicial notice of the laws of the state conferring upon notaries or other officers the authority to administer an oath. However, proof of the official character of a notary may be required by statute where the affidavit is taken before a notary of a county other than that in which the affidavit is to be used, 33 and this is frequently required where the affidavit is taken in another state. 34

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## Footnotes

Footnote 28. Dyer v Flint, 21 Ill 80.

**Practice Aids:** –Forms for signature and title of officer taking affidavit. 1 Am Jur Legal Forms 2d, Affidavits and Declarations §§ 13:92 et seq.; 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Forms 61 et seq.

Footnote 29. Bayonne Knife Co. v Umbenhauer, 107 Ala 496, 18 So 175; Tunis v Withrow, 10 Iowa 305; Hill v Alliance Bldg. Co., 6 SD 160, 60 NW 752.

Footnote 30. *Colman v Goodnow*, 36 Minn 9, 29 NW 338 (holding that where a statute requires a register of deeds to affix his seal to all documents requiring his official signature, a mechanic's lien was invalid because the register administering the oath and certifying the affidavit did not affix his seal thereon; and it would be ineffective to affix such seal after the statutory time for the filing of the claim had elapsed).

Footnote 31. *Meldrum v United States* (CA9 Or) 151 F 177.

The court will take judicial notice of the notaries within its own county, and such a notary need not affix his seal to the jurat if the statute does not specially require him to do so. *Dyer v Flint*, 21 Ill 80.

Where an information is sworn to before a clerk of court, the seal of the court need not be affixed to the jurat, since the seal is merely to attest the genuineness of the clerk's signature and the court is presumed to know its officers and their signatures. *State v Forsha*, 190 Mo 296, 88 SW 746.

Footnote 32. § 14.

Footnote 33. *Dyer v Flint*, 21 Ill 80.

Footnote 34. § 19.

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## § 19 --Affidavit taken in another state

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In general, a foreign affidavit must contain all the requisites essential to an affidavit when taken in the domestic state, 35 and in some jurisdictions, as a result of statute or decision, certain additional formal requirements apply to the authentication of such affidavits which are not applicable to a domestic affidavit. 36 Statutes relating to the authentication of affidavits taken in foreign states may require, in addition to the ordinary attestation with the notary's or other officer's seal attached, that the affidavit be accompanied by a certificate of the county clerk or other proper officer, under his hand and official seal, stating that the officer before whom the affidavit was taken is duly commissioned and authorized by the statutes of his state to administer oaths. 37

In the absence of any statutory provisions as to what shall constitute a sufficient authentication of the official character of a foreign notary, his seal of office is generally considered sufficient. 38 Also, it has been held that a recital by the notary in his certificate that he is authorized by the laws of his state to administer oaths sufficiently indicates his authority. 39 And, in the absence of any statute specifically regulating the authentication of an affidavit taken in a foreign state, there is considerable authority in support of the view that it will be presumed that a foreign notary has the same power in the foreign state as a notary has under the laws of the state of the forum; 40 However, in accordance with the disagreement among the older cases as to whether a notary has any

inherent nonstatutory power to administer an oath or to attest affidavits in any matter not connected with the protest of commercial paper, 41 some courts declined to take judicial notice of the authority of a notary in another state to take affidavits, but required that the authority of the officer before whom the affidavit was taken be shown. 42 some of these cases express the view that the power of the notary to administer an oath is customary and inherent in his office, and that statutes conferring the power are merely declaratory in their nature. 43 It has been said that the recognition of the power of a notary to take affidavits has become so general, if not universal, that there is now no good reason why it should not now be recognized as one of the general powers of notaries.

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## **§ 19 --Affidavit taken in another state [SUPPLEMENT]**

**Practice Aids:** Certificate of authority—Of officer of court taking affidavit in another state—By clerk of court. 1B Am Jur Pl & Pr Forms (Rev), Affidavits, § 101.

### **Case authorities:**

Although both pages of out-of- state affidavit in opposition to defendants' motion for summary judgment in medical malpractice action should have been accompanied by certificate authenticating authority of oath administrator, court properly refused to reject affidavit for technical failure to comply with CLS CPLR § 2309(c), where only result would have been in further delay because affidavit could have been given nunc pro tunc effect once properly acknowledged. *Nandy v Albany Medical Center Hosp.* (1989, 3d Dept) 155 AD2d 833, 548 NYS2d 98.

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### **Footnotes**

Footnote 35. *Gibson v Tilton* (Md) 1 Bland Ch 352.

Footnote 36. *Dyer v Flint*, 21 Ill 80.

**Practice Aids:** —General forms of affidavits taken before officer in another jurisdiction. 1 Am Jur Legal Forms 2d, Affidavits and Declarations §§ 13:125, 13:126; 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Forms 125, 126.

—Certificates of authority of officer taking affidavit in another jurisdiction. 1 Am Jur Legal Forms 2d, Affidavits and Declarations §§ 13:102, 13:103; 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Forms 81, 82.

Footnote 37. *Turtle v Turtle*, 31 App Div 49, 52 NYS 857.

For authentication of extradition papers, see 31 Am Jur 2d, Extradition §§ 40, 41, 46.

Footnote 38. *Simpson v Wicker*, 120 Ga 418, 47 SE 965.

Footnote 39. *Mineral P. R. Co. v Keep*, 22 Ill 9.

Footnote 40. *Simpson v Wicker*, 120 Ga 418, 47 SE 965; *Wood v St. Paul City R. Co.*, 42 Minn 411, 44 NW 308.



Footnote 41. Simpson v Wicker, 120 Ga 418, 47 SE 965.

As to authority of notaries to administer oaths and take affidavits generally, see 58 Am Jur 2d, Notaries Public § 19.

Footnote 42. Teutonia Loan & Bldg. Co. v Turrell, 19 Ind App 469, 49 NE 852; Holbrook v Libby, 113 Me 389, 94 A 482.

Footnote 43. Simpson v Wicker, 120 Ga 418, 47 SE 965.

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## **§ 20 Form drafting guide–Checklist of matters to be included in affidavit**

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The following matters should generally be included in an affidavit:

- Venue
- Name of affiant
- Residence of affiant
- Status or capacity of affiant
- Statement that affiant was duly sworn or affirmed, or that such affidavit was made under oath
- Statement of facts, set forth in separately numbered paragraphs
- Signature of affiant
- Jurat, including date
- Signature and title of officer
- Seal of officer, if any
- Authentication 44

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## **§ 20 ----Form drafting guide–checklist of matters to be included in affidavit [SUPPLEMENT]**

**Practice Aids:** Moynihan, Affidavit Evidence. 14 Litig 3, Spring, 1988.

**Statutes:**

28 USCS § 1746 provides that whenever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the form prescribed the statute.

**Case authorities:**

Form complaint signed by pro se prisoner, which contained typewritten statement "I declare under penalty of perjury that the foregoing is true and correct," was verified within language of 28 USCS § 1746; thus, he pled specific facts that had to be addressed before district court could dismiss case. *Williams v Browman* (1992, CA6 Mich) 981 F2d 901, 24 FR Serv 3d 753.

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**Footnotes**

Footnote 44.

- ◆ Caution: Local statutes should be consulted to determine the applicability of a checkpoint in a particular jurisdiction.

**B. Statement of Facts [21-26]****Research References**

ALR Quick Indexes, Affidavits

Federal Quick Index, Affidavits

L Ed Index to Annotations, Affidavits

1 Am Jur Pl & Pr Forms (Rev), Affidavits, Forms 91 et seq.

1 Am Jur Legal Forms 2d, Affidavits and Declarations §§ 13:152, 13:153

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**§ 21 Generally; sufficiency**

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Although allegations upon information and belief are, in some instances, permissible, 45 facts in an affidavit should, ordinarily, be alleged positively as of knowledge, rather than as of belief. 46 If possible, an affidavit should be made by one having actual knowledge

of the facts, 47 and its allegations should be of the pertinent facts and circumstances, rather than conclusions, 48 and should be full, certain, and exact. 49 Reasonable certainty, however, is all that is required, 50 and in determining its sufficiency, the affidavit should be construed as a whole. 51 Apart from the specific purpose it is designed to serve or effectuate, the true general test of the sufficiency of the statement of facts in an affidavit is whether it has been drawn in such a manner that it might be the basis of a charge of perjury if any material allegation contained therein is false. 52

The statutory requirements as to affidavits have, in certain cases, been liberally, 53 and in other cases strictly, 54 construed, depending in the main, of course, upon the nature of the language of the statutory requirement. Where a statute requiring an affidavit is worded in the form of a prohibition, it will be construed as being mandatory, rather than merely directory, and all of the required facts must be set forth. 55 A statute may require that the affiant be made to speak in the first person. 56

Where a number of witnesses are making affidavits as to the same state of facts, the close similarity of language of such affidavits, even with respect to minute details, will render them open to suspicion and, therefore, objectionable. 57 Each witness should be examined as to the facts which have come under his own cognizance, and he should tell them in his own way, not merely swear to that which has been sworn to by another. 58

The affidavit may be in the form of a verification, that is, a sworn statement of the truth of the facts stated in the instrument verified. An affidavit thus referring to an attached instrument is as full and complete as if the matters stated in such instrument were set out in the affidavit itself. 59

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## **§ 21 ----Generally; sufficiency [SUPPLEMENT]**

**Practice Aids:** Verification. 1B Am Jur Pl & Pr Forms (Rev), Affidavits, § 135.

### **Case authorities:**

District court's finding that lease descriptions of oil wells in lien affidavits by section was sufficient was not clearly erroneous; in addition to providing section information, affidavit descriptions provided lease name and well number, which would allow third party to identify well affected. *Phillips Petroleum Co. v Best Oilfield Servs.* (1995, CA5 La) 48 F3d 913.

Trial court erred in denying wife's motion to set aside final decree of annulment obtained by service by publication, where despite his statement in affidavit, husband did not exercise due diligence to ascertain wife's address; although wife had refused to disclose address of shelter for abuse victims at which she was residing, husband and wife had met while attending criminal proceedings during time affidavit was filed, and wife's address was readily available from clerk's office and Commonwealth attorney's office, and husband had been requested to communicate with wife through her attorney. *Khanna v Khanna* (1994, Va App) 443 SE2d 924.

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## **Footnotes**

Footnote 45. § 22.

Footnote 46. § 21.

Footnote 47. *People ex rel. Raster v Healy*, 230 Ill 280, 82 NE 599; *Esa v New York Property Ins. Underwriting Asso.* (2d Dept) 89 App Div 2d 865, 453 NYS2d 247.

Footnote 48. *Atiya v Di Bartolo* (1st Dist) 63 Cal App 3d 121, 133 Cal Rptr 611 (affidavits setting forth only conclusions, opinions, or ultimate facts are insufficient); *PPX Enterprises, Inc. v Ducale Edizione Musicali*, 42 NY2d 897, 397 NYS2d 987, 366 NE2d 1341 (affidavit stating that hearing was adjourned, was conclusory and without acceptable legal affect).

An affidavit which simply states opinions and conclusions is not sufficient. *Torkelson v Byrne*, 68 ND 13, 276 NW 134, 113 ALR 1213.

An affidavit for a search warrant which merely states the conclusion that the law has been violated, but gives no evidential facts, is insufficient. *Booth v State*, 67 Okla Crim 413, 94 P2d 846.

Where an attorney's affidavit stated that he tendered the fees for a transcript when he ordered it, the word "tender" was a word of art which, standing alone, appeared to be a mere legal conclusion. *Re Estate of Caha*, 195 Neb 333, 237 NW2d 870.

A rule requiring that an affidavit state evidentiary facts and not merely conclusions may be satisfied if from the document as a whole it appears the affidavit is based on the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify as to its contents. *Allied American Ins. Co. v Mickiewicz* (1st Dist) 124 Ill App 3d 705, 80 Ill Dec 129, 464 NE2d 1112.

When ultimate facts or conclusions of law appear in an affidavit which also contains the proper subject of affidavit testimony, facts within the personal knowledge of the affiant, the extraneous material should be disregarded, and only the facts considered. *A. L. Pickens Co.* (CA6 Ky) 650 F2d 118.

Footnote 49. *State v Quartier*, 114 Or 657, 236 P 746 (not followed on other grounds *State v Flores*, 68 Or App 617, 685 P2d 999, review den 298 Or 151, 690 P2d 507); *Robertson v Humble Oil & Refining Co.* (Tex Civ App) 116 SW2d 820, writ diss w o j; *Goodman v Henry*, 42 W Va 526, 26 SE 528.

Corporate attorney's affidavit for service by publication was sufficient where it stated facts upon which court could base judgment whether search and inquiry were sufficiently diligent. *Downey State Bank v Major-Blakeney Corp.* (Utah) 545 P2d 507, later app (Utah) 556 P2d 1273 (ovrld on other grounds *Management Services Corp. v Development Associates* (Utah) 617 P2d 406).

**Practice Aids:** –Introductions to statement of facts in affidavits. 1 Am Jur Legal Forms 2d, Affidavits and Declarations §§ 13:32 et seq.; 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Forms 21 et seq.

–Allegations as to status of affiant as member of armed forces. 1 Am Jur Legal Forms

2d, Affidavits and Declarations § 13:152; 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Form 104.

–Allegations as to status of affiant as indigent. 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Forms 103, 103.1.

Footnote 50. Appeal of Cusick, 136 Pa 459, 20 A 574.

Ultimate facts may be stated. Olson v Advance-Rumely Thresher Co., 43 SD 518, 180 NW 961. See also Coffee v Haynes, 124 Cal 561, 57 P 482.

Footnote 51. Whipple v Hill, 36 Neb 720, 55 NW 227.

Footnote 52. People ex rel. Raster v Healy, 230 Ill 280, 82 NE 599; People v Lennox, 94 Misc 2d 730, 405 NYS2d 581 (affiant is held to strict accountability for the truth and accuracy of the contents of his affidavit); Torkelson v Byrne, 68 ND 13, 276 NW 134, 113 ALR 1213; Booth v State, 67 Okla Crim 413, 94 P2d 846; State v Quartier, 114 Or 657, 236 P 746 (not followed on other grounds State v Flores, 68 Or App 617, 685 P2d 999, review den 298 Or 151, 690 P2d 507); Dixon v Mayfield Bldg. Supply Co. (Tex Civ App Fort Worth) 543 SW2d 5.

The same test applies in the case of a foreign affidavit, although it seems that a prosecution for perjury cannot be sustained in one state for a false oath taken in another state; the test is whether the foreign affidavit would support a charge of perjury if it had been made within the state of the forum. Gibson v Tilton (Md) 1 Bland Ch 352.

Footnote 53. Olson v Advance-Rumely Thresher Co., 43 SD 518, 180 NW 961 (affidavit to set aside a default judgment).

Footnote 54. Heitz v Sayers, 31 Del 221, 113 A 901; Butcher v Cappon & Bertsch Leather Co., 148 Mich 552, 112 NW 110. See Atwood v Roan, 26 ND 622, 145 NW 587; Smith v McDuffee, 72 Or 276, 142 P 558, adhered to 72 Or 287, 143 P 929.

Footnote 55. Appeal of Cusick, 136 Pa 459, 20 A 574 (statute requiring affidavits from voters).

Footnote 56. State ex rel. Eastman v Eastman, 77 Or 522, 151 P 967; Smith v McDuffee, 72 Or 276, 142 P 558, adhered to 72 Or 287, 143 P 929.

Footnote 57. State ex rel. Fletcher v District Court of Jefferson County, 213 Iowa 822, 238 NW 290, 80 ALR 339 (involving a number of similar affidavits of residents of a county presented in resistance to the state's application for a change of venue of certain criminal cases on the ground of popular prejudice and excitement); Moore v Ewing, 1 NJL 144.

Footnote 58. Moore v Ewing, 1 NJL 144.

Footnote 59. Ausmus v People, 47 Colo 167, 107 P 204; State ex rel. Dox v Board of Equalization, 10 Iowa 157.

Where the affidavit to an answer stated that the defendant "has read the foregoing answer, and that the facts stated therein alleged on information and belief are verily

believed to be true, and that the facts alleged upon her own statements are true to the best of her knowledge and belief," the answer was evidence of probative value sustaining the interlocutory injunction, since it showed on its face what facts were alleged on information and what essential facts were alleged on her own statements. *Kniepkamp v Richards*, 192 Ga 509, 16 SE2d 24.

A verified pleading may also be used as an affidavit if the facts stated therein are true to the party's own knowledge. *Bruce E. M. v Dorothea A.M.* (Del Sup) 455 A2d 866.

Generally as to verification of pleadings, see 61A Am Jur 2d, Pleading §§ 340 et seq.

**Practice Aids:** –Affidavit in form of verification. 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Form 111.

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## § 22 Positive allegations

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Ordinarily, the facts of an affidavit must be stated positively, and not merely as a matter of belief; 60 and allegations to the "best" of the affiant's "knowledge and belief," 61 or upon information and belief, 62 are generally regarded as insufficient, except where authorized expressly or impliedly by statute. 63 In some instances, however, the border line between knowledge and belief is a tenuous one, 64 and the purpose for which the affidavit is employed may have bearing on the court's ruling. 65 Some courts hold that if the statements in an affidavit are made positively, an additional statement that the affiant believes them to be true does not detract from the positive character of the affidavit. 66

In some states, by virtue of express statutory provisions, the allegation of affidavits required for certain purposes may be averred in a qualified, rather than a positive, manner. 67 Likewise, a statute may be interpreted to require only the affiant's belief. Thus, it has been held that under a statute disqualifying a judge from trying a criminal case where the defendant files an affidavit, supported by the affidavits of others, that such judge "will not afford him a fair trial," the averments of the affiants that they "believe" that the judge will not afford the defendant a fair trial meet the requirements of such statute. 68

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## Footnotes

Footnote 60. *Heitz v Sayers*, 31 Del 221, 113 A 901; *Hahn v Frederick* (Fla) 66 So 2d 823; *Kniepkamp v Richards*, 192 Ga 509, 16 SE2d 24; *Shanholtzer v Thompson*, 24 Okla 198, 103 P 595; *Ex parte Owen*, 10 Okla Crim 284, 136 P 197; *State v Quartier*, 114 Or 657, 236 P 746 (not followed on other grounds *State v Flores*, 68 Or App 617, 685 P2d 999, review den 298 Or 151, 690 P2d 507); *Miller v First State Bank & Trust Co.* (Tex Civ App) 184 SW 614 (allegation that the affiant, "upon his own knowledge, . . . believes the allegations of fact and statements . . . are true"); *Collier v Smith* (Tex Civ App) 169

SW 1108, writ ref (statement that the affiant "believes the facts therein contained to be true").

An affidavit stated on mere belief is not sufficient as a basis for the issuance of a legal search warrant, under a constitutional provision that no warrant shall issue except on probable cause supported by oath or affirmation. *Burtch v Zeuch*, 200 Iowa 49, 202 NW 542, 39 ALR 1349.

An affidavit was sufficient, even though it did not specifically state that it was made on the affiant's own personal knowledge, where the facts were stated positively, and not merely as a matter of belief, or "to the best of affiant's knowledge and belief." *United Bonding Ins. Co. v Dura-Stress, Inc.* (Fla App D2) 243 So 2d 244.

**Practice Aids:** –Allegation as to personal knowledge of affiant with respect to matters stated in complaint on information and belief. 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Form 105.1.

–Allegations in statement of facts–status of real property. 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Form 106.

–Identification of person. 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Form 107.

–Denial of execution of instrument. 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Form 108.

–Correctness of account. 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Forms 109, 110.

Footnote 61. *Heitz v Sayers*, 31 Del 221, 113 A 901 (holding that under a statute requiring a claimant of a mechanic's lien to make an affidavit to the truth and correctness of his claim, an affidavit stating the facts alleged "are true to the best of his knowledge and belief" was insufficient).

The verification to the complaint in a divorce action, stating that the facts therein set forth were true to the best of the petitioner's knowledge and belief, was insufficient. *Ross v Ross*, 34 Del 7, 130 A 677.

On the other hand, where one made a verification to an information charging a misdemeanor, alleging that the facts stated "are true, according to his best knowledge and belief," such affidavit was held sufficient in *State v Bennett*, 102 Mo 356, 14 SW 865, where the court stated that "when a person swears to its [the information's] truth 'according to his best knowledge and belief,' he does all that should justly be required of him."

An affidavit sworn to on best knowledge, as opposed to being sworn to on best knowledge and belief, is sufficient. *Ex Parte Miller* (Tex Civ App Dallas) 604 SW2d 324.

Footnote 62. § 22.

Footnote 63. Under a statute authorizing an affidavit in a suit for the recovery of personal chattels to be made by the plaintiff, his agent, or attorney, the making of an affidavit by

an agent or attorney necessarily implied that he might not be able to make it on positive knowledge, and an affidavit "to the best of his knowledge, information and belief" was sufficient until controverted. *United States v Bryant*, 111 US 499, 28 L Ed 496, 4 S Ct 601.

Footnote 64. *Leigh v Green*, 64 Neb 533, 90 NW 255, affd 193 US 79, 48 L Ed 623, 24 S Ct 390; *Miller v First State Bank & Trust Co.* (Tex Civ App) 184 SW 614.

Footnote 65. *State v Bennett*, 102 Mo 356, 14 SW 865.

Footnote 66. *State v Bennett*, 102 Mo 356, 14 SW 865 (the addition of the phrase "and belief" does not impair the force of the word "knowledge"); *Leigh v Green*, 64 Neb 533, 90 NW 255, affd 193 US 79, 48 L Ed 623, 24 S Ct 390 (the statements were made positively, but at the end there was the further statement, "all of which I verily believe to be true").

However, with respect to an affidavit on which a warrant of arrest is based, in which it is alleged "the statements therein contained are true as I verily believe," it has been held that such facts are not positively sworn to, but are verified as a matter of belief, and such affidavit does not meet the requirements of the Fourth Amendment to the United States Constitution or of the state Bill of Rights. *Ex parte Owen*, 10 Okla Crim 284, 136 P 197.

Footnote 67. *Thompson v Thompson*, 226 US 551, 57 L Ed 347, 33 S Ct 129 (ovrld on other grounds *Vanderbilt v Vanderbilt*, 354 US 416, 1 L Ed 2d 1456, 77 S Ct 1360).

Footnote 68. *State v Irvine*, 335 Mo 261, 72 SW2d 96, 93 ALR 232, where the court said that the courts will not so construe a statute as to make it require an impossibility or to lead to absurd results if it is susceptible of a reasonable interpretation.

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## § 23 Allegations on information and belief

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Since, ordinarily, the facts of an affidavit must be stated positively, 69 an affidavit the statements of which are alleged on information and belief will usually be held insufficient, 70 except when authorized by statute, either expressly 71 or by implication. 72 An affidavit, the statements of which are alleged on information and belief, is insufficient in any instance where the affiant is required to make the affidavit as to the substantive truth of the facts stated, and not merely as to good faith. 73 On the other hand, where a statute requires an affidavit as to facts which are necessarily matters of information and belief, such as opinions and conclusions of law, an affidavit on information and belief will suffice. 74 And some courts holding a bare statement of information and belief insufficient allow such form where, in addition, facts are stated leading a court reasonably to infer that the belief is justified. 75

◆ Caution: Generally, where an affidavit on information and belief is permissible,



additional allegations as to the source of the affiant's information and the grounds of his belief are essential, it being for the judicial mind to determine whether such belief is well- or ill-founded. 76 Statutes permitting allegations on information and belief may specifically require the facts on which the belief is based to be stated. 77

It would seem that where an affidavit is not required by statute, constitutional provision, or rule of court, the strict rule requiring positive allegations would not be applicable. 78 Where a positive form of allegation is required, there is a divergence of opinion as to the effect of an affidavit stated on information and belief only. It has been held that such an affidavit is not a nullity, that the defect is waived if such objection is made for the first time on appeal, 79 and that the averments of such an affidavit may be made positive by amendment. 80 On the other hand, it has been held that such an affidavit is void. 81

Although affidavits upon which warrants of arrest in extradition cases are based may not be on information and belief, unless facts are alleged meriting the inference, on the part of a magistrate, of probable cause, 82 the general tendency is to uphold such affidavits wherever possible. 83

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## **§ 23 ----Allegations on information and belief [SUPPLEMENT]**

**Practice Aids:** Status of allegation—Based on information and belief. 1B Am Jur Pl & Pr Forms (Rev), Affidavits, Form .

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### **Footnotes**

Footnote 69. § 21.

Footnote 70. *Star Motor Imports v Superior Court of Santa Clara County* (1st Dist) 88 Cal App 3d 201, 151 Cal Rptr 721; *Heitz v Sayers*, 31 Del 221, 113 A 901; *Stephens v Northern Indiana Public Service Co.* (5th Dist) 87 Ill App 3d 961, 42 Ill Dec 808, 409 NE2d 423; *Clarke v Nebraska Nat. Bank*, 57 Neb 314, 77 NW 805; *Cook v Whipple*, 55 NY 150; *Miller v First State Bank & Trust Co.* (Tex Civ App) 184 SW 614.

An affidavit on information and belief is insufficient to support an application for a search warrant, under a constitutional provision that no warrant shall issue except upon probable cause supported by oath or affirmation. *State v Arregui*, 44 Idaho 43, 254 P 788, 52 ALR 463; *State v Peterson*, 27 Wyo 185, 194 P 342, 13 ALR 1284.

As to the validity of an affidavit to an application to open or vacate a judgment, which is made on information and belief, see 46 Am Jur 2d, Judgments § 776.

Footnote 71. *Miller v Corning Glass Works*, 102 Ariz 326, 429 P2d 438.

Footnote 72. *Miller v Corning Glass Works*, 102 Ariz 326, 429 P2d 438; *Ross v Ross*, 34 Del 7, 130 A 677; *Smith v Collis*, 42 Mont 350, 112 P 1070; *Leigh v Green*, 64 Neb 533, 90 NW 255, affd 193 US 79, 48 L Ed 623, 24 S Ct 390.

Under a statute authorizing an affidavit to be made by the plaintiff, his agent, or attorney, it has been held that the making of an affidavit by an agent or attorney necessarily

implies that he may not be able to make it on personal knowledge; hence, where it appeared in a suit that an agent was a special agent of the United States general land office, an affidavit to the best of his knowledge, information, and belief has been held sufficient until controverted. *United States v Bryant*, 111 US 499, 28 L Ed 496, 4 S Ct 601.

Footnote 73. *Miller v Corning Glass Works*, 102 Ariz 326, 429 P2d 438. *Hahn v Frederick* (Fla) 66 So 2d 823, holding that where a statute required that the facts stated as the basis for making a main affidavit be "supported in substance" by affidavits of at least two reputable citizens, a statement in the supporting affidavit that the facts stated in the main affidavit were true "to the best of his knowledge, information and belief" was insufficient because it amounted to no more than a statement that so far as his knowledge went the facts were true, and that to "support the facts in substance" the affidavit should have been to the effect that the affiant had knowledge of the facts and knew them to be true.

Footnote 74. *Kniepkamp v Richards*, 192 Ga 509, 16 SE2d 24; *Smith v Collis*, 42 Mont 350, 112 P 1070; *Leigh v Green*, 64 Neb 533, 90 NW 255, *affd* 193 US 79, 48 L Ed 623, 24 S Ct 390.

When an affidavit must necessarily contain facts derived from others or is dependent upon opinions of the affiant, such an affidavit may be made on information and belief. *Callenius v Blair* (Iowa) 309 NW2d 415.

**Practice Aids:** –Statement of facts on information and belief. 1 Am Jur Legal Forms 2d, Affidavits and Declarations § 13:153; 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Form 105.

Footnote 75. *Ex parte Murray*, 112 SC 342, 99 SE 798, 5 ALR 1152.

As to affidavit for attachment on information and belief, see 6 Am Jur 2d, Attachment and Garnishment § 267.

Footnote 76. *Ross v Ross*, 34 Del 7, 130 A 677; *Clarke v Nebraska Nat. Bank*, 57 Neb 314, 77 NW 805; *Ex parte Bank of Monroe* (NY) 7 Hill 177; *Torkelson v Byrne*, 68 ND 13, 276 NW 134, 113 ALR 1213; *Booth v State*, 67 Okla Crim 413, 94 P2d 846 (search warrant issued on affidavit made on information and belief and without stating facts showing probable cause was illegal); *Wakely v Sun Ins. Office*, 246 Pa 268, 92 A 136, 3 ALR 128; *Black Hills Mercantile Co. v Bender*, 59 SD 241, 238 NW 883, 86 ALR 585; *Robertson v Humble Oil & Refining Co.* (Tex Civ App) 116 SW2d 820, writ *dism w o j.*

Affidavits on information and belief without giving the source of the information or the grounds of belief are mere hearsay and incompetent as evidence. *Re Kuser's Estate*, 132 NJ Eq 260, 26 A2d 688.

The use in federal court of an affidavit upon information and belief must be assumed to be in accord with the local state practice, where court of that state has adjudged such an affidavit to be sufficient, there being no local law excluding its use. *Thompson v Thompson*, 226 US 551, 57 L Ed 347, 33 S Ct 129 (*ovrld* on other grounds *Vanderbilt v Vanderbilt*, 354 US 416, 1 L Ed 2d 1456, 77 S Ct 1360).

Footnote 77. *Delaplain & Co. v Armstrong & Ulrich*, 21 W Va 211; *First Nat. Bank v Swan*, 3 Wyo 356, 23 P 743.

Footnote 78. *State ex rel. Short v Owens*, 125 Okla 66, 256 P 704, 52 ALR 1270 (ovrld on other grounds *Best v Evans* (Okla) 297 P2d 379) and (disagreed with on other grounds *Gilbert v State* (Okla Crim) 648 P2d 1226), holding that where an affidavit was not required by constitutional provision or statute, an information charging contempt which is verified on information and belief is sufficient.

Footnote 79. *Landfair v Lowman*, 50 Ark 446, 8 SW 188.

Footnote 80. *Booth v Rees*, 26 Ill 45; *Cook v Whipple*, 55 NY 150.

As to amendment of affidavits, see §§ 26, 27.

Footnote 81. *Moore v Neill*, 86 Ga 186, 12 SE 222; *Gilbert v Burke*, 11 Ohio CC NS 282, 20 Ohio CD 586.

Footnote 82. *Ex parte Murray*, 112 SC 342, 99 SE 798, 5 ALR 1152.

Footnote 83. *Re Germain*, 258 Mass 289, 155 NE 12, 51 ALR 789.

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## § 24 Allegations in the alternative

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If a remedy exists upon proof of any one of various distinct and separate grounds, an affidavit which alleges alternatively that one or another ground exists does not definitely allege the existence of either ground and, by reason of the uncertainty of its allegations, is generally held insufficient. 84 A distinction, however, is to be taken between alleging in the alternative two or more distinct grounds, and alleging in the alternative two or more phases of a single ground; in the latter case, the alternative form is of no consequence. 85 Hence, where a statute lists the various grounds in separate subdivisions, and where the matter stated within a single subdivision relates to one general subject matter and is worded disjunctively in the statute itself, an affidavit which similarly alleges such subject matter is simply alleging different phases of a single ground, and is valid. 86

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## Footnotes

Footnote 84. *Helton v McLeod & Dantzler*, 93 Miss 516, 46 So 534; *Re Kuser's Estate*, 132 NJ Eq 260, 26 A2d 688; *Piedmont Grocery Co. v Hawkins*, 83 W Va 180, 98 SE 152, 4 ALR 828.

Footnote 85. *Societe Fonciere et Agricole v Milliken*, 135 US 304, 34 L Ed 208, 10 S Ct 823; *Bickerdike v Allen*, 157 Ill 95, 41 NE 740; *McCarthy Bros. Co. v McLean*

County Farmers Elevator Co., 18 ND 176, 118 NW 1049; Johnson v Emery, 31 Utah 126, 86 P 869; Piedmont Grocery Co. v Hawkins, 83 W Va 180, 98 SE 152, 4 ALR 828.

**Practice Aids:** –Statement of facts based on alternative allegations. 1 Am Jur Legal Forms 2d, Affidavits and Declarations § 13:154.

Footnote 86. McCarthy Bros. Co. v McLean County Farmers Elevator Co., 18 ND 176, 118 NW 1049 (allegation that the "defendants have sold, assigned, transferred, secreted, or otherwise disposed of, or are about to sell, assign, transfer, etc., with the intent to cheat or defraud their creditors, or to hinder or delay them in the collection of their debts"), and Johnson v Emery, both supra (allegation that the defendant has disposed of, or is about to dispose of, his property with the intent to defraud his creditors).

An affidavit in attachment which alleged, in almost the precise language of the statute, that the defendant "is not a resident corporation, or is a foreign corporation, or is acting as such" was held valid, notwithstanding its disjunctive form. Societe Fonciere et Agricole v Milliken, 135 US 304, 34 L Ed 208, 10 S Ct 823.

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## § 25 Allegations in language of statute

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An affidavit need not follow the precise language of the statute requiring such affidavit, a substantial compliance being sufficient. 87

◆ **Caution:** If the wording of the statute is not followed, care must be taken that the language used in the affidavit leaves no doubt as to its being in substance the same. 88

In some cases, the question of how much must be alleged has been raised, that is, whether it is enough to follow the exact wording of the statute, or whether one must go further into detail and allege facts tending to support such allegation. It has been held that an allegation, if it is in the exact language of the statute, may not be attacked as a mere conclusion of law, even though no facts tending to support the allegation are stated. 89 In certain instances, if the language of a statute is copied verbatim, the result may be a meaningless statement. 90 In accordance with the general rule, 91 the true test as to the sufficiency of an affidavit in the very words of the statute is whether or not a charge of perjury could be based upon it. 92

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## Footnotes

Footnote 87. Simonton v Simonton, 40 Idaho 751, 236 P 863, 42 ALR 1363; Burton v Curyea, 40 Ill 320; State v Bailey, 157 Ind 324, 61 NE 730; Clayton v Clark, 76 Kan 832, 92 P 1117.

Footnote 88. Butcher v Cappon & Bertsch. Leather Co., 148 Mich 552, 112 NW 110

(holding that where the affiant, being one of the plaintiffs, averred that the defendant "is indebted to deponent" instead of that he "is indebted to plaintiff" as required by statute, the affidavit was defective). A statute requiring the "stating of defendant's residence if known to the affiant, and, if not known, stating that fact," was not complied with by an affidavit "that the last known postoffice address of the defendant is unknown," the term "residence" and "postoffice" not being synonymous or interchangeable. *Atwood v Roan*, 26 ND 622, 145 NW 587.

Footnote 89. *Coffee v Haynes*, 124 Cal 561, 57 P 482 (allegation that garnishee "has property of said judgment debtor"); *McDaniel v McElvy*, 91 Fla 770, 108 So 820, 51 ALR 731 (affidavit for service by publication that names and residences of persons interested are unknown to complainant and have not been ascertained after diligent inquiry).

Footnote 90. *Miller v Munson*, 34 Wis 579 (holding such an affidavit defective).

Footnote 91. § 20.

Footnote 92. *Miller v Munson*, 34 Wis 579.

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## § 26 Allegations as to intent, state of mind, or fraud

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Ordinarily, a bare allegation in an affidavit that a certain act of another was accompanied by a certain intent or that a certain state of mind existed on the part of an individual is absolutely insufficient; a state of mind can be testified to by another only from the outward acts and circumstances under which it manifests itself, and those facts and circumstances should, therefore, be set forth in order that the court may pass judgment as to whether or not the conclusion of the affiant is well founded. <sup>93</sup> Thus, where fraud is to be shown, it is not enough simply to allege the doing of an act which in itself does not show fraud, but may equally reflect an innocent, as well as a guilty, intent, and assert that such act was done with fraudulent intent; the material facts and circumstances from which such intent is deductible should be stated. <sup>94</sup>

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### Footnotes

Footnote 93. *Goodman v Henry*, 42 W Va 526, 26 SE 528.

Footnote 94. *Tatlow v Bacon*, 101 Kan 26, 165 P 835, 14 ALR 269, error dismd 251 US 537, 64 L Ed 402, 40 S Ct 55 (holding that it was not sufficient, in an affidavit, to obtain an execution against the person, to make general statements that the defendants have fraudulently concealed their property to prevent the collection of the judgment and have assigned and disposed of it to prevent it from being taken on execution, without specifically setting forth the facts).

It is not sufficient, in an affidavit made to obtain an attachment, merely to allege a conveyance and assert that it was made with intent to defraud. *Goodman v Henry*, 42 W Va 526, 26 SE 528.

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## V. AMENDMENT [27, 28]

### **Research References**

ALR Quick Indexes, Affidavits

Federal Quick Index, Affidavits

L Ed Index to Annotations, Affidavits

1 Am Jur Pl & Pr Forms (Rev), Affidavits, Form 25

1 Am Jur Legal Forms 2d, Affidavits and Declarations § 13:33

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### **§ 27 Generally; void or voidable affidavits**

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Generally, where an affidavit which is the basis of a court's jurisdiction is defective, the court cannot permit an amendment. 95 But some courts have held that minor defects in such an affidavit were not jurisdictional and could be avoided. 96 In general, it has been held that if the insufficiency of the affidavit renders it not void, but merely voidable, it may be amended. 97

Amendment may be authorized by the terms of a statute governing the particular proceeding, but even under such a statute, an affidavit which is so defective that it cannot be regarded as an affidavit is a nullity and may not be cured by amendment. 98

Under some statutes, amendments both of substance and of form have been permitted. 99 But where an amendment of substance is allowed, as where the matter sworn to is changed or where new additional matter is incorporated, it is necessary that the oath or affirmation be readministered. 1

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### **§ 27 ----Generally; void or voidable affidavits [SUPPLEMENT]**

#### **Case authorities:**

Defendant's motion to strike government's declaration was dismissed as moot, because government filed corrected declaration that complied with requirements of 28 USCS § 1746. *United States v Gritz Bros. Partnership* (1994, ED Wis) 155 FRD 639.

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### **Footnotes**

Footnote 95. *Butcher v Cappon & Bertsch Leather Co.*, 148 Mich 552, 112 NW 110.

Footnote 96. *Ruthe v Green Bay & M. R. Co.*, 37 Wis 344 (holding that a mistake in the name of the plaintiff is not a jurisdictional defect, but may be corrected by amendment at any time).

An affidavit on appeal from a conviction of a misdemeanor in justice court was not fatally defective because it prayed for an appeal to the criminal court in the county, where the circuit court was the only court in the county having jurisdiction of criminal causes appealed from justice court. *State ex rel. Benton v Kirby* (Mo App) 106 SW2d 512.

Footnote 97. *Wattles v Lillibridge*, 117 Mich 662, 76 NW 115; *Goodman v Henry*, 42 W Va 526, 26 SE 528.

As to whether omission of jurat or signature thereto may be cured by amendment, see § 17.

As to whether allegations made on information and belief can be made positive by amendment, see § 22.

**Practice Aids:** –Introductory statements in amendments to affidavits. 1 Am Jur Legal Forms 2d, Affidavits and Declarations § 13:33; 1 Am Jur Pl & Pr Forms (Rev), Affidavits, Form 25.

Footnote 98. *Booth v Rees*, 26 Ill 45.

Where a statute provided that no suit should be quashed on account of any defect in the affidavit, provided the plaintiff should, wherever objection should be made, file such affidavit as was required by law, it was nevertheless held that an affidavit taken before a clerk of court in vacation, who was without authority to administer the oath, was void, so that the court could not obtain jurisdiction by a subsequent amendment. *Greenvault v President, Directors & Co. of Farmers' & Mechanics' Bank* (Mich) 2 Dougl 498.

As to amendment of affidavits in attachment and garnishment proceedings, see 6 Am Jur 2d, Attachment and Garnishment §§ 270 et seq. (attachment), §§ 333, 334 (garnishment).

Footnote 99. *Richards v Bestor*, 90 Ala 352, 8 So 30; *Sannoner v Jacobson*, 47 Ark 31, 14 SW 458.

Under a statute expressly authorizing amendments to defective affidavits, it has been held that an affidavit in support of a writ of attachment could be amended by adding a new ground for the attachment, especially where it appeared that the defendant was not taken by surprise or put to any disadvantage. *Fitzpatrick v Flannagan*, 106 US 648, 27 L Ed 211, 1 S Ct 369.

Footnote 1. *Fleming v Fleming*, 141 Ga App 51, 232 SE2d 391; *St. Louis & S. F. R. Co. v State*, 26 Okla 62, 107 P 929.

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## § 28 Disqualification of officer taking affidavit

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According to the weight of authority, if the officer before whom an affidavit is sworn to, though having general authority to administer oaths, is disqualified in the particular case, the affidavit is not void, but merely voidable, and may be amended by swearing to it before another officer, 2 although there is some authority to the contrary. 3 But where the person before whom the affidavit is taken is without authority in any case, such affidavit is void and not amendable. 4

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### Footnotes

Footnote 2. *Snow v State*, 91 Tex Crim 1, 237 SW 563, 20 ALR 1180 (affidavit on motion for new trial sworn to by an accused before his own attorney); *Ramsay Motor Co. v Wilson*, 47 Wyo 54, 30 P2d 482, 91 ALR 908 (affidavit for attachment; applying rule where the disqualification arose by virtue of express statutory enactment).

As to persons qualified to take affidavits, see §§ 8 et seq.

Footnote 3. *Leavitt & Milroy Co. v Rosenberg Bros. & Co.*, 83 Ohio St 230, 93 NE 904.

Footnote 4. *Greenvault v President, Directors & Co. of Farmers' & Mechanics' Bank (Mich)* 2 Dougl 498; *Owens v Johns*, 59 Mo 89.

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## VI. USE AND ADMISSIBILITY [29-32]

### Research References

ALR Quick Indexes, Affidavits

Federal Quick Index, Affidavits

L Ed Index to Annotations, Affidavits

1 Am Jur Legal Forms 2d, Affidavits and Declarations § 13:127

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### § 29 Generally

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Affidavits may be used for various purposes in both judicial proceedings and extrajudicial matters. The many uses which may be made of affidavits in judicial proceedings are illustrated by the statutory provisions of some of the states, which provide, for example, that an affidavit may be used to verify a pleading, 5 to prove



service of process by publication, 6 or to obtain a provisional remedy. 7 In general practice, affidavits may be used to start in motion the process of the court and are generally received as evidence upon the hearing of motions, irrespective of the vital influence the latter may have upon the final outcome of the suit. 8 In this regard, however, their use may be subject to certain limitations, according to the nature of the proceeding, 9 as in the case of an attempt to impeach a verdict by an affidavit of the jurors who rendered it. 10

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## **§ 29 ----Generally [SUPPLEMENT]**

### **Case authorities:**

District court has discretion to consider late affidavit if it chooses to do so by virtue of Rule 6(d), and Rule 6(b) allows court to enlarge Rules' time periods; however, these exceptions should generally be used only if cause or excusable neglect has been shown by party failing to comply with time periods. *Orsi v Kirkwood* (1993, CA4 Va) 999 F2d 86, 26 FR Serv 3d 234.

As general rule, party is not permitted to create issue of fact by submitting affidavit whose conclusions contradict prior deposition or other sworn testimony; however, supplemental affidavits can be employed to clarify ambiguous or confusing deposition testimony. *Buckner v Sam's Club* (1996, CA7 Ind) 75 F3d 290.

Defendant's motion to strike government's declaration was dismissed as moot, because government filed corrected declaration that complied with requirements of 28 USCS § 1746. *United States v Gritz Bros. Partnership* (1994, ED Wis) 155 FRD 639.

Where transcript of testimony of police officer at bench trial in District Court was unavailable, affidavit of defendant's counsel who was present at and participated in proceeding as to contents of police officer's testimony should have been accepted by judge (at de novo jury of six session) in support of motion to suppress, although strict requirements of affidavit pursuant to Rules of Criminal Procedure were not followed. *Commonwealth v Santosuosso* (1986) 23 Mass App 310, 501 NE2d 1186.

Purpose of affidavit requirement of Massachusetts Rules of Criminal Procedure is (1) to give judge considering motion statement of anticipated evidence, in reliable form, to meet defendant's initial burden of establishing facts necessary to support motion, and (2) to provide Commonwealth with fair notice of specific facts relied on in support of motion set forth in form (under oath) which is not readily subject to change by affiant. *Commonwealth v Santosuosso* (1986) 23 Mass App 310, 501 NE2d 1186.

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### **Footnotes**

Footnote 5. See 61A Am Jur 2d, Pleading § 345.

Footnote 6. See 62 Am Jur 2d, Process § 169.

Footnote 7. See 5 Am Jur 2d, Arrest § 12; 6 Am Jur 2d, Attachment and Garnishment §§ 254 et seq., 332 et seq.; 42 Am Jur 2d, Injunctions § 285.

Footnote 8. Walker v First Industrial Bank, 95 Colo 411, 36 P2d 467; State ex rel. Hansen v District Court of Ninth Jud. Dist., 72 Mont 245, 233 P 126; Dunn v Silk, 155 Va 504, 155 SE 694, 71 ALR 667 (motion relating to the confirmation of execution or judicial sales).

As to use of affidavits in conjunction with motions generally, see 56 Am Jur 2d, Motions, Rules, and Orders §§ 13, 20.

**Practice Aids:** –Notice of filing of affidavit. 1 Am Jur Legal Forms 2d, Affidavits and Declarations § 13:127.

Footnote 9. Upon a motion to set aside an award, an affidavit cannot be used to prove that the arbitrators erred, as such act must appear upon the face of the record or their report, although it may be used to prove partiality or misbehavior. Plesants Shore & Co. v Ross, 1 Va 156.

Footnote 10. See 76 Am Jur 2d, Trial § 1219.

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## § 30 As evidence

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At a trial, the adverse party has a right to be confronted by the witnesses against him, if possible, and is entitled to the general protection of the rule excluding hearsay evidence; consequently, affidavits are not, as a rule, admissible in the trial as independent evidence to establish facts material to the issues being tried. 11 Nor are they admissible as prima facie evidence of the facts they contain, for to admit them for this purpose would be equally objectionable, since the burden of going forward with the proof would thereby be cast upon the adverse party, and if the affidavit was not contradicted, it might establish the cause of action. 12 However, an affidavit may be admissible as evidence on a material fact at issue if evidence is admissible generally on that fact as an exception to the hearsay rule. 13 And affidavits are competent evidence where their use as evidence is authorized by statute. 14

While an affidavit is generally inadmissible as a piece of independent testimony, the opposite party may waive objection to its admissibility, 15 and that incompetent statements in an affidavit become competent evidence when admitted without objection. 16 Also, where the fact of the making of an affidavit is itself the point in issue, the affidavit is properly received as evidence of this fact only. 17 Affidavits may be admissible as a part of the judicial record of the cause to which they relate, 18 and recorded affidavits may be admissible in evidence in accordance with a statute so providing. 19 An affidavit made by a party to the action may be offered in evidence by the other party as an admission. 20 Again, under appropriate circumstances, an affidavit may be used to impeach a witness on the stand where such witness has previously sworn to statements in the affidavit which are inconsistent with his present

testimony. 21 It cannot, however, be used to corroborate a witness whose testimony is unimpeached. 22

Where an affidavit is admissible as evidence of its contents, it can be deemed no more conclusive as to the existence of those facts than any other kind of testimony. 23 On the other hand, every discrepancy contained in an affidavit does not justify a trial court's refusal to give credence to such evidence, and in light of the jury's role in resolving questions of credibility, a trial court should not reject the contents of an affidavit even if it is at odds with statements made in an earlier deposition. 24

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### **§ 30 ----As evidence [SUPPLEMENT]**

#### **Case authorities:**

Safety management expert's affidavit asserting that plaintiff had slipped and fallen as direct result of stepping on watch that had been dropped or knocked off temporary jewelry display plaintiff was perusing, was properly excluded since it was wholly conjecture and without evidentiary support and merely stated obvious—that improperly displayed merchandise can fall to floor where someone might step on it and fall. *Buckner v Sam's Club* (1996, CA7 Ind) 75 F3d 290.

Affidavit complies with FRCP 56(e) if it presents evidence which would be admissible at trial; as general rule, this requires that affiant have personal knowledge of information contained in affidavit. *Reed v Aetna Casualty & Sur. Co.* (1995, ND Ind) 160 FRD 572.

On motion for summary judgment in action arising out of partnership agreement, Special Term properly disregarded affidavits of personal knowledge prepared by defendant before his death and submitted on initial summary judgment motion; Dead Man's Statute did not apply, since evidence involved consisted of 2 affidavits of personal knowledge by decedent himself, and not testimony of any transactions or communications with him, but affidavits would nevertheless be inadmissible at any subsequent trial because they were self-serving hearsay and did not come within any recognized exception to hearsay rule. *Friedman v Sills* (1985, 2d Dept) 112 App Div 2d 343, 491 NYS2d 794.

District court's exclusion of affidavit by former staff member of regional planning agency on issue of value of plaintiff's development rights in her property was not error, since he was not appraiser either by experience, education or other training, and his experience in facilitating property owners in transfer of development rights program was not equivalent to experience in assigning market value to regional planning agency development rights. *Suitum v Tahoe Regional Planning Agency* (1996, CA9 Nev) 80 F3d 359, 96 CDOS 2229, 96 Daily Journal DAR 3723.

Although head coach's affidavit alleging specific instances of assistant coach's refusals to follow directions and questioning of head coach's judgment contained some examples not based on head coach's personal knowledge, those incidents were not hearsay since they were not offered to prove truth of events but rather to prove head coach's motive for failing to renew assistant coach's contract. *Wallace v Texas Tech Univ.* (1996, CA5 Tex) 80 F3d 1042, 70 BNA FEP Cas 1521.

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## Footnotes

Footnote 11. *M'Iver v Kyger*, 16 US 53, 4 L Ed 332; *Bill C. Harris Constr. Co. v Powers*, 262 Ark 96, 554 SW2d 332, 14 ALR4th 812 (superseded by statute on other grounds as stated in *Hackett v State*, 2 Ark App 228, 619 SW2d 687); *Henry Cowell Lime & Cement Co. v Industrial Acci. Com.*, 211 Cal 154, 294 P 703, 72 ALR 1118 (physician's affidavit should not be considered as evidence by Workmen's Compensation Commission); *Burritt Mut. Sav. Bank v Tucker*, 183 Conn 369, 439 A2d 396; *Re Estate of Hartman* (3d Dist) 65 Ill App 3d 380, 21 Ill Dec 677, 381 NE2d 1221; *Lenihan v Commonwealth*, 165 Ky 93, 176 SW 948 (disbarment proceeding); *Gilboe v Doerflinger Realty Co.* (Mo App) 614 SW2d 4; *Doyle v Union Ins. Co.*, 209 Neb 385, 308 NW2d 322; *Re Eldridge*, 82 NY 161 (disbarment proceeding); *Re Hill*, 36 NC App 765, 245 SE2d 378, cert den 295 NC 550, 248 SE2d 726; *Chapman v Dickerson* (Tex Civ App) 223 SW 318; *Zinn v Tobin Packing Co.*, 140 Vt 410, 438 A2d 1110.

An affidavit is within the hearsay rule the same as an unsworn instrument. *Patterson v Maryland Ins. Co.* (Md) 3 Harr & J 71.

Ex parte affidavits to which the rules of evidence are not applied are not juridical evidence, and hence are incapable of supporting a judicial decision in a proceeding at law. *Staley v South Jersey Realty Co.*, 83 NJ Eq 300, 90 A 1042.

After the pleadings are properly at issue, the proof must be produced in the regular way by the production and examination of the witnesses; an ex parte sworn account is of no consequence. *Greene v Greene*, 145 Miss 87, 110 So 218, 49 ALR 565.

An affidavit of a repairman as to repairs done on a truck is inadmissible to support the insured's claim that the truck was fully repaired before he applied for the policy sued upon, where the repairman was not called as a witness. *Southern Farm Bureau Cas. Ins. Co. v Anderson*, 220 Ark 373, 247 SW2d 966.

An affidavit filed on behalf of a corporation by its president with the state tax department is inadmissible to prove the financial condition of the corporation. *Lucas v Swan* (CA4 W Va) 67 F2d 106, 90 ALR 210.

A statement in an insurance policy relating to proof of loss which provides that insured shall render his sworn statement concerning his knowledge and belief as to the cause of loss or damage, and shall cause his employees to submit to examination under oath, which statement is included to aid insurer to determine whether insured has suffered a loss, as a preliminary to passing on his claim, does not vary or affect the hearsay rule which renders the affidavit inadmissible in evidence. *Midwestern Ins. Co. v Rapp* (Okla) 296 P2d 770, 5 OGR 757.

In light of the hearsay rule, the affidavit of a person serving summons is not admissible to show that service was made. *Queensboro Leasing, Inc. v Resnick*, 78 Misc 2d 919, 358 NYS2d 939.

But see *R. A. Piloto, Inc. v Allstate Ins. Co.* (Fla App D3) 397 So 2d 1029 (holding, in an action to recover under a business package policy of insurance issued by defendant, that the copy of an affidavit of a deceased mail clerk supporting proof of the mailing of the insurer's notice of cancellation of the policy was properly authenticated so as to permit it

to be introduced into evidence in the exercise of the trial court's discretion).

Affidavit which had been executed prior to affiant's deposition was admissible into evidence at the trial where affiant had been available at the taking of the deposition for cross-examination. *Gellis v B. L. I. Constr. Co.*, 148 Ga App 527, 251 SE2d 800.

For general discussion of hearsay evidence, see 29 Am Jur 2d, Evidence §§ 493 et seq.

Footnote 12. *Smith v State*, 147 Ga 689, 95 SE 281, 15 ALR 490; *Patterson v Maryland Ins. Co. (Md)* 3 Harr & J 71.

Footnote 13. *Lupyan v Lupyan*, 263 Pa Super 303, 397 A2d 1220 (holding that although affidavit was not conclusive on issue of deceased grantor's intent, it was admissible as circumstantial evidence thereof, to be considered by the trier of fact, in accordance with general rule allowing evidence of decedent's declaration of intent as exception to the hearsay rule where such intent is itself a material fact).

Affidavits of police which linked a juvenile defendant to the crime charged were properly admitted at a hearing on a petition for transfer of the matter from the juvenile to the criminal court, for the limited purpose of determining if there was evidence on which the grand jury could return an indictment. *Re P.A.C. (Tex Civ App Amarillo)* 562 SW2d 913 (ruling that affidavits could not be hearsay since they were admitted for the sole purpose of establishing that the statements had been made to the police and not for the purpose of proving the truth of any assertion in the statements).

Footnote 14. *Vannier v Superior Court*, 32 Cal 3d 163, 185 Cal Rptr 427, 650 P2d 302 (affidavit procedure under Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases does not violate constitutional rights).

Footnote 15. *Connecticut Mut. Life Ins. Co. v Hillmon*, 188 US 208, 47 L Ed 446, 23 S Ct 294 (also holding that where the party who has offered the deposition of a witness also offers in evidence an affidavit of the same witness containing statements inconsistent with the testimony in the deposition, if the introduction of such affidavit is not objected to by the opposite party, such affidavit may be availed of by the opposite party as independent evidence, and not merely as impeaching the credibility of the witness).

An affidavit of the testator's grandson, submitted by consent in lieu of testimony, was admissible in evidence and was properly considered insofar as it furnished information as to the situation surrounding the testator at the time he executed his will. *Fidelity Union Trust Co. v Robert*, 36 NJ 561, 178 A2d 185.

Footnote 16. *Vartanian v Croll*, 117 Cal App 2d 639, 256 P2d 1022; *Naficy v Braker* (Tex App Houston (14th Dist)) 642 SW2d 282 (absent an objection at the time of trial, the trial court may properly consider an affidavit as evidence).

An affidavit which does not measure up to formal standard is subject to a motion to strike, but in the absence of such a motion or other objection, the lack of showing of personal knowledge is waived, unless it is clear from the affidavit itself that it is not based on personal knowledge of the facts. *Vermilion Corp. v Vaughn* (La) 397 So 2d 490.

Footnote 17. *Phoenix Ins. Co. v Lawrence*, 61 Ky 9.

Footnote 18. See 30 Am Jur 2d, Evidence § 973.

Footnote 19. Dollar v Thompson, 212 Ga 831, 96 SE2d 493.

Footnote 20. National S.S. Co. v Tugman, 143 US 28, 36 L Ed 63, 12 S Ct 361;  
Chicago & N. R. Co. v Ohle, 117 US 123, 29 L Ed 837, 6 S Ct 632.

Affidavits or statements of third persons used by a party in a former trial to corroborate his own testimony may be used as evidence against him in a subsequent controversy, on the ground that they are admissions. Bageard v Consolidated Traction Co., 64 NJL 316, 45 A 620.

An objection to an affidavit in the lower court on the ground that the assertion that the appellant was the respondent's agent was a conclusion was properly overruled, even if it be conceded, without deciding, that the assertion of agency was a conclusion, because the conduct of appellant, as disclosed in the facts set forth in the affidavit, clearly constituted an admission of agency. Vartanian v Croll, 117 Cal App 2d 639, 256 P2d 1022.

Footnote 21. Colonial Refrigerated Transp., Inc. v Mitchell (CA5 Tex) 403 F2d 541, 12 FR Serv 2d 1050; Walrod v Webster County, 110 Iowa 349, 81 NW 598; Re Leshner's Will, 269 App Div 812, 55 NYS2d 630; State v Fales, 114 RI 519, 335 A2d 920.

**Annotation:** 14 ALR4th 828.

For general discussion of impeachment of witnesses by means of prior inconsistent statements, see 81 Am Jur 2d, Witnesses §§ 596 et seq.

Footnote 22. Judd v Letts, 158 Cal 359, 111 P 12.

Footnote 23. Schroeder v Drees, 1 Wis 2d 106, 83 NW2d 707.

The general rule is that affidavits are commonly regarded as weak evidence, to be received with caution, and that they are not conclusive of the facts stated therein, even though not contradicted by counter affidavits. Audit Services, Inc. v Kraus Constr., Inc. (Mont) 615 P2d 183.

An affidavit is entitled to a rebuttable presumption of truth and the burden is on the opposite party to rebut the statements therein. Irby v Brooks, 246 Ga 794, 273 SE2d 183.

Footnote 24. Kennett-Murray Corp. v Bone (CA5 Ala) 622 F2d 887.

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## § 31 --Admissibility on incidental questions

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The affidavit of a party may be received on an incidental question arising on the trial of a

cause which does not affect the issue to be tried by the jury. 25 And a statute may expressly provide that an affidavit as to certain incidental facts is competent evidence to prove such facts. 26

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**Footnotes**

Footnote 25. An affidavit to establish the loss of an original paper as a basis for the introduction of secondary evidence, and not relating to its contents, has been held properly received. *Taylor v Riggs*, 26 US 591, 7 L Ed 275.

Footnote 26. *Nind v Myers*, 15 ND 400, 109 NW 335 (affidavit of mailing notice of time when the right to redeem from a tax sale expires).

A statutory provision to the effect that an affidavit may be used upon a motion relates to preliminary, collateral, and interlocutory matters, and an affidavit by insurer's attorney is not admissible to establish that under the law of another state attorney's fees are not recoverable by the plaintiff in an action on an insurance policy. *Banks v Metropolitan Life Ins. Co.*, 142 Neb 823, 8 NW2d 185.